(22,845)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 87.

THE BANK OF ARIZONA, HUGO RICHARDS, AND MOSES B. HAZELTINE, PLAINTIFFS IN ERROR,

vs.

THE THOMAS HAVERTY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original.	Print
Caption	a	1
Record from district court for the county of Maricopa	1	1
Judgment-roll	1	1
Complaint	1	1
Answer and demurrer	9	5
Subpœna duces tecum	12	6
Amended answer and demurrer	14	7
Subpœna duces tecum	17	9
Instructions requested by defendant and refused	19	10
Verdict	22	11
Judgment	23	12
Clerk's certificate	24	12
Plaintiff's Exhibit B—Letter of Armstrong & Lewis to Alexander & Chr[illegible]ary 13, 1909	25	13
C—Deed [illegible]om Thomas Haverty Company to Bank of Arizona, March 9, 1910	26	13
D—Letter of M. B. Hazeltine to Armstrong & Lewis, December 3, 1908	29	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 28, 1913.

	Original.	Print
Minute entries	31	16
Order noting demand for jury	31	16
Order overruling demurrer	31	16
Order setting for trial	32	16
Order substituting attorneys	32	16
Order overruling demurrer	33	17
Order beginning trial	33	17
Order resuming trial	34	17
Order concluding trial	36	18
Order to furnish meal to jury	37	18
Order entering verdict, &c	37	18
Order continuing hearing on motion for new trial	38	19
Order submitting motion for new trial	38	19
Order denying motion for new trial	39	19
Order granting time to file bill of exceptions	39	19
Order entering notice of appeal	40	20
Appeal bond	40	20
Clerk's certificate to minute entries and appeal bond	44	21
Motion for new trial	44	21
Amended motion for new trial	47	23
Defendant's first bill of exceptions	49	24
Objection to argument for plaintiff	49	24
Motions for new trial overruled	50	25
Judge's certificate	51	25
Defendant's second bill of exceptions	51	25
Colloquy between court and counsel	52	25
Jurors called	55	27
Statement of counsel for plaintiff	55	27
Examination of juror E. E. Jack	56	27
F. L. Rankin	57	28
Thos. McGrath	59	29
E. J. Doyle	61	30
M. L. Gibbons	62	31
R. H. Drane	63	31
James R. Porter	64	32
James Helmer	65	33
E. A. Spaulding	67	35
Chris. Monibon	68	35
J. O. Toney	68	36
R. H. Vaughn	69	36
C. E. Holland	70	37
Carter Kniveton	71	38
Irving L. Hill	73	39
Elwood Hadley	74	40
T. J. Walker	75	41
Ira W. Stalnaker	76	41
Jury sworn	77	42
Demand for letters	78	42
Opening statement	78	42
Offers for plaintiff, &c	79	43
Testimony of George D. Christy	82	44
J. L. B. Alexander	113	58

	Original.	Print
Testimony of Thomas Armstrong, Jr.	124	68
Thomas Haverty	139	70
Motion to direct verdict for defendant, &c.	143	72
Testimony of E. W. Lewis	149	74
Thomas Armstrong, Jr.	163	80
E. W. Wells	169	82
M. B. Haseltine	177	86
E. W. Wells (recalled)	186	90
Evidence closed	188	90
Motion to direct verdict for defendant, &c.	188	91
Charge to jury	192	92
Reporter's certificate	201	96
Judge's certificate	202	97
Order setting cause for hearing	203	97
Order submitting cause	203	97
Opinion	204	98
Judgment	214	102
Motion for rehearing	216	103
Order submitting motion for rehearing	217	103
Order denying motion for rehearing	217	104
Notice of appeal	218	104
Order granting appeal and fixing bond	218	104
Petition for writ of error	219	104
Order granting writ of error	222	106
Assignment of errors	224	107
Supersedeas bond	228	109
Clerk's certificate	233	111
Writ of error	234	111
Citation and service	237	112

a In the Supreme Court of the Territory of Arizona.

No. 1176.

THE BANK OF ARIZONA, a Corporation, Appellant,
vs.
THE THOMAS HAVERTY COMPANY, a Corporation, Appellee.

Robert E. Morrison, Esq., and Joseph H. Kibbey, Esq., and Walter Bennett, Esq., (of the law firm of Kibbey, Bennett & Bennett), attorneys for appellant.
J. L. B. Alexander, Esq., and George D. Christy, Esq., (of the law firm of Alexander & Christy), and Alfred Franklin, Esq., attorneys for appellee.

On Appeal from the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

1 Be it remembered that on to-wit: the 23rd day of November, 1910, came the Appellant in the above entitled cause by its attorneys and filed in the clerk's office of said Court, in said entitled cause, a certain Judgment Roll, in words and figures following to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THOMAS HAVERTY COMPANY, a Corporation, Plaintiff,
vs.
THE BANK OF ARIZONA, a Corporation, Defendant.

Complaint.

Comes now the above named plaintiff Thomas Haverty Company, a corporation, by its attorneys, Alexander & Christy and Alfred Franklin, Esq., and complains of the above named defendant, The Bank of Arizona, a corporation, and alleges:

I.

That the plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principle place of business at the City of Los Angeles, in said State of California, and that the defendant is a corporation, organized and
2 existing under and by virtue of the laws of the Territory of Arizona, with its principal place of business at the City of Prescott, County of Yavapai, Arizona;

II.

That on the 28th day of February, 1908, plaintiff had and was the owner of a certain claim and demand against one John Noble in the sum of $14,306.00, for materials and labor furnished by plaintiff to said John Noble in the construction and erection of a certain building known as the "Noble Building" by said John Noble on Lots 4, 5 and 6 in block 20 of the City of Phœnix, in Maricopa County, Arizona, which said sum of $14,306.00 was then due to said plaintiff and unpaid, and for the purpose of better securing the payment of said sum so due and unpaid as aforesaid, plaintiff on said last mentioned date duly made and filed in the office of the County Recorder of Maricopa County, Arizona, its claim of lien upon the lots hereinbefore described and the building thereon, and afterwards, to-wit, on or about the 9th day of March, 1908, instituted an action by filing its complaint in the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, to fix and foreclose its said claim of lien upon said lots and the building thereon, wherein this plaintiff, Thomas Haverty Company, a corporation, and Foulkes-Gaylord Company, a corporation,
3 were joined as plaintiffs, and John Noble, Hugo Richards, H. Albright, Henry W. Ryder, F. A. Munson, W. H. Herman, G. W. & G. I. Bently, National Bank of Arizona, a corporation, Arizona Club, a corporation, Dorris-Heyman Furniture Company, a corporation, Morris Goldwater and Barry Goldwater, a copartnership under the firm name and style of M. Goldwater & Brother, were defendants, which said action is numbered 5484 in said court;

III.

That at the time of the institution of said action as aforesaid, the said Hugo Richards, one of the defendants therein, held a mortgage upon the said premises upon which the plaintiff so claimed a lien as aforesaid, and that the said defendant Hugo Richards at the time said mortgage was so executed and delivered to him was an officer of said Bank of Arizona, defendant herein, and that the loan for which the security of said mortgage was so given was made by the said Bank of Arizona and the note and mortgage therefor were taken in the name of the said Hugo Richards for the use, convenience, and benefit of the said Bank of Arizona, which was the real party in interest;

IV.

That while the said action aforesaid was pending and undetermined in said court, and, to-wit, on or about the 30th day of November, 1908, the defendant, the Bank of Arizona, at the
4 City of Phœnix, in the County of Maricopa, Territory of Arizona, approached this plaintiff and then and there offered to purchase of the said plaintiff the plaintiff's said demand and claim for lien therefor, and promised and agreed with the plaintiff that, if the plaintiff would promise and agree with the defendant to sell to the said defendant its said demand and claim for lien, and

would promise and agree to prosecute its said suit thereon to judgment, and would promise and agree to thereafter assign the same to the said defendant, that it, the said defendant, would buy the plaintiff's said demand and claim of lien of the said plaintiff and would pay to the plaintiff therefor the sum of $9,313.90 at the time of the assignment of said judgment to the defendant, the said sum of $9,313.90 being then the amount claimed by said plaintiff as a lien upon the said Noble Building less the sum of $4,992.10, the said sum of $4992.10 being the value of two certain boilers and a certain heating apparatus and certain tools furnished and delivered by the plaintiff and used in and toward the erection, construction, and completion of the said Noble Building, and for which the plaintiff claimed a lien upon said building and the lots of land upon which the same is situated, and which said boilers, heating apparatus, and tools the plaintiff should be at liberty to remove from the said Noble building if the same could be done without injury thereto; that thereupon the plaintiff then and there did promise and agree
5 with the defendant to sell to the said defendant its said demand against the said John Noble and its said claim for lien upon said premises, and did promise and agree to prosecute the said action thereon to judgment, and did agree to assign said judgment recovered therein to this defendant;

V.

That this plaintiff has fulfilled and performed its promise and agreement with the defendant herein, the Bank of Arizona, in this behalf, in every particular, and did prosecute the said action to judgment, and did recover a judgment in the said action in said court in the sum of $12,429.22, together with a foreclosure of the plaintiff's said claim for lien aforesaid on the said John Noble building and the lots of land on which the same is situate, and did, perform on its part each and every of the conditions of said promise and agreement on its part to be performed; the said judgment bearing date the 2nd day of January, 1909.

VI.

That thereafter, on or about the 1st day of February, 1909, this plaintiff was ready and willing and then and there offered to assign to the said defendant the Bank of Arizona, a corporation, the said judgment so recovered by it, but that the defendant herein, disregarding its said promise and agreement in this behalf, then and there and at that time informed the plaintiff that it would
6 not accept or receive an assignment or any assignment of said judgment and would not pay to this plaintiff the said sum of $9,313.90, or any part thereof, which the defendant promised to pay to plaintiff as aforesaid for the said demand and claim for lien and the assignment of the judgment therefor;

VII.

That before the commencement of this action this plaintiff tendered in writing to the defendant herein a full and complete assign-

ment of the said judgment, and then and there offered to deliver the same to the defendant herein, and then and there requested the defendant to accept the same and to pay the plaintiff the sum — $9,313.90 as the defendant herein promised so to do, but that the said defendant herein, not regarding its said promise and agreement in this behalf, did not and would not at any time or at all accept or receive the said assignment of said judgment from the plaintiff or any assignment of said judgment and would not pay plaintiff the said sum of $9,313.90 or any part thereof or at all, and the defendant then and there wholly neglected and refused so to do and still continues so to neglect and refuse to accept or receive the said assignment thereof, or any assignment thereof and still continues to neglect and refuse to pay plaintiff the said sum of $9,313.90 or any part thereof, to the damage of the plaintiff in the sum of $9,313.90.

7 VII.

That plaintiff, to keep good its tender of the assignment of said judgment to the defendant the Bank of Arizona, a corporation, herein, brings the same into court with this complaint for the said defendant and hereby offers to make, execute and deliver to the said defendant herein any other or different assignment of the said judgment as may be requested by the defendant in compliance with the terms of said agreement aforesaid.

Second Count.

I.

Plaintiff re-alleges, re-affirms, incorporates in, and makes a part of this count all the allegations contained in paragraph I of the first count of this complaint;

II.

That the defendant herein the Bank of Arizona, a corporation, was, to-wit, on the first day of February, 1909, and now is, at the City of Phœnix, Maricopa County, Territory of Arizona, indebted to this plaintiff in the sum of 9,313.90, for the sale by this plaintiff to the defendant of plaintiff's demand against one John Noble and claim for lien therefor upon that certain building known as the "Noble Building," and upon Lots 4, 5, and 6 in Block 20 in the City
8 of Phœnix, Maricopa County, Arizona, whereon said building is situate, and the assignment of a certain judgment recovered in the District Court of the Third Judicial District of the territory of Arizona, in and for the County of Maricopa, in an action in said Court, upon said demand and claim for lien, wherein this plaintiff was joined with Foulkes-Gaylord Company a corporation, as plaintiffs against John Noble, et al., as defendants, the said suit being Number 5484 in the said District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, and the said judgment being dated the 2nd day of January, 1909, and at the special instance and request of the defendant herein, the

Bank of Arizona, a corporation, and being so indebted, it the said Bank of Arizona, a corporation, in consideration thereof afterwards, to-wit, on the day and year last aforesaid, at the City of Phœnix, Maricopa County, Arizona, undertook and then and there promised to the said plaintiff to pay this plaintiff the said sum of $9,313.90, when it the said Bank of Arizona, a corporation, should be thereunto afterward requested;

III.

That this plaintiff has demanded of the defendant herein the payment of the said sum of $9,313.90, but that no part of the same has been paid and the whole thereof is now due and unpaid.

9 Wherefore, this plaintiff, Thomas Haverty Company, a corporation, demands judgment against the defendant herein, the Bank of Arizona, a corporation, for the sum of $9313.90, with interest thereon from the first day of February, 1909, at the rate of six per cent per annum, and for its costs of suit.

ALEXANDER & CHRISTY,
ALFRED FRANKLIN,
Attorneys for Plaintiff.

Here follows a copy of summons which is omitted by direction of Attorneys for Plaintiff in Error.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THOMAS HAVERTY CO., a Corporation, Plaintiff,
vs.
THE BANK OF ARIZONA, a Corporation, Defendant.

Answer and Demurrer.

Comes now the Bank of Arizona, the Defendant above
10 named by Thomas Armstrong, Jr., its attorney and demurs to the Plaintiff's Complaint, and for cause of demurrer shows that said Complaint fails to state facts sufficient to constitute a cause of action.

Wherefore this Defendant prays judgment that this action be dismissed and it recover its costs.

Should the foregoing demurrer be overruled, then this Defendant for its answer to the Plaintiff's Complaint shows to the Court:

1.

The Defendant admits that the parties hereto are corporations organized and existing, and with their principal places of business as stated in the Plaintiff's Complaint.

The Defendant further admits that the Plaintiff was on or about the 28th day of February, 1908, the holder of a certain claim and demand against one John Noble, for materials and labor furnished

as stated in the Plaintiff's Complaint, and had filed in the office of the County Recorder of Maricopa County, Arizona, its claim for a lien to secure the payment of its said claim, and had also instituted an action to fix and foreclose its said claim for lien as alleged in the Plaintiff's Complaint, but as to the amount of said claim, or whether the said claim was a just and valid claim, this Defendant has
11 no knowledge or information sufficient to form a belief.

The Defendant further shows that Hugo Richards, one of the Defendants named in the said Complaint and action to foreclose his said lien as aforesaid, had held a mortgage upon the premises upon which the said Plaintiff claimed a lien, but shows that the said mortgage had been foreclosed and the said Richards had bid in the said premises, and held the same under a Certificate of Sale issued to him by the Sheriff of Maricopa County under his said foreclosure.

The Defendant further admits that the Plaintiff has prosecuted his action mentioned in the Plaintiff's Complaint to Judgment, and has offered to assign the judgment so obtained by it to this Defendant, and this Defendant has refused to accept the same or to pay therefor.

Further answering this Defendant denies each and every allegation, matter and thing in Plaintiff's Complaint contained, not hereinbefore expressly admitted or denied.

Wherefore the Defendant prays judgment that this action may be dismissed upon the merits, and that it recover its costs herein incurred.

Dated at Phœnix, April 11, 1910.

THOS. ARMSTRONG, Jr.,
Attorney for the Defendant,
The Bank of Arizona.

Filed April 19, 1910.

12 In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

THOMAS HAVERTY COMPANY, a Corporation, Plaintiff,
vs.
THE BANK OF ARIZONA, a Corporation, Defendant.

Subpœna Duces Tecum.

To Thomas Armstrong, Jr., Phœnix, Arizona, Greeting:

You are hereby commanded, laying aside all business, to appear before the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, at the Court House of said County, in the City of Phœnix, on the 23rd day of May, A. D. 1910, at the hour of nine o'clock in the forenoon, to testify and give evidence before said court in the above entitled action on behalf of the plaintiff in said action, and that you bring with you and produce at the time and place aforesaid:

1st. All letters and telegrams or copies thereof written and sent

by the late firm of Armstrong and Lewis of the City of Phœnix, Arizona, to the Bank of Arizona, a corporation, the defendant in said action, or to M. B. Haseltine, Cashier of the said Bank of Arizona, or to M. B. Haseltine, or to E. W. Wells, or to Hugo Richards, at Prescott, Arizona, between the first day of October, 1908, and the thirty-first day of December, 1908;

13 2nd. All letters and telegrams or copies thereof written and sent by Thomas Armstrong, Jr., or E. W. Lewis to the said The Bank of Arizona, a corporation, the defendant in said action, or to M. B. Haseltine, Cashier of said The Bank of Arizona, a corporation, or to M. B. Haseltine, or to E. W. Wells, or to Hugo Richards, at Prescott, Arizona, between the first day of October, 1908, and the thirty-first day of December, 1908;

3rd. All letters and telegrams received by the late firm of Armstrong and Lewis, Phœnix, Arizona, from The Bank of Arizona, a corporation, the defendant in said action, or from M. B. Haseltine, or from E. W. Wells, or from Hugo Richards, dated at Prescott, Arizona, between the first day of October, 1908, and the thirty-first day of December, 1908;

4th. All letters and telegrams received by Thomas Armstrong, Jr., or by E. W. Lewis from The Bank of Arizona, a corporation, the defendant in said action, or from M. B. Haseltine, the Cashier of said The Bank of Arizona, or from M. B. Haseltine, or from E. W. Wells, or from Hugo Richards, dated at Prescott, Arizona, or elsewhere, between the first day of October, 1908, and the thirty-first day of December, 1908.

Of this fail not under penalty of the law.

Witness the Honorable Edward Kent, Judge of the District Court of the Third Judicial District of the Territory of Arizona, in

14 and for Maricopa County, this 25th day of April, A. D. 1910.

[SEAL.] ELIAS F. DUNLEVY, *Clerk.*

SHERIFF'S OFFICE,
Maricopa County, Arizona Territory, ss:

I received the within Subpœna Duces Tecum, on the 30th day of April, A. D. 1910, and served the same on the 30th day of April, 1910, by reading this subpœna to the within named Thomas Armstrong, Jr., and by personally delivering to and leaving with him a copy of the same at Phœnix, in Maricopa County, Arizona Territory.

CARL HAYDEN,
Sheriff of Maricopa County,
Arizona Territory.

Filed May 18, 1910.

(Title of Court and Cause.)

Amended Answer and Demurrer.

Comes now the Bank of Arizona, the Defendant above named, by R. E. Morrison and J. H. Kibbey, its attorneys, and demurs to

the Plaintiff's Complaint, and for cause of demurrer shows that said Complaint fails to state facts sufficient to constitute a cause of action.

Further the defendant demurs specially to all and so much of the Plaintiff's Complaint as is contained in the first count there of and for cause of demurrer shows that said first count fails to state facts sufficient to constitute a cause of action.

Further the defendant demurs specially to all and so much of the Plaintiff's Complaint as is contained in the second count thereof and for cause of demurrer shows that said second count fails to state facts sufficient to constitute a cause of action.

15 Wherefore the defendant prays judgment that this action be dismissed and it recover its costs.

Should the foregoing demurrers be overruled then the defendant for its answer to the plaintiff's complaint shows to the court that it admits the corporate character of the parties hereto.

Further answering, the defendant denies each and every other allegation, matter and thing in the plaintiff's complaint contained.

For its further answer this defendant shows that said plaintiff failed to do or perform any of the promises, conditions and things to be by it performed in or by the alleged agreement set up in the plaintiff's complaint and specifically denies that said plaintiff prosecuted to judgment its demand and claim for lien described in the complaint; but, on the contrary, shows that the only judgment to which the same was prosecuted was one for $12,429.22 and no more, and that, although the claim for lien set up by the plaintiff in his said action was one alleged to be prior and superior to that of this defendant upon the property described in the complaint, the said claim was not prosecuted to judgment but, on the contrary, was by the judgment rendered in said cause No. 5484, expressly determined and adjudged, by the court in which the same was tried, to be inferior and subordinate to the liens of this defendant.

16 Further answering this defendant shows that no good or valuable thing whatsoever was ever offered, paid, or promised to be paid, given, or transferred by the plaintiff to this defendant for the alleged making of the alleged promise or agreement set up in the plaintiff's complaint herein and that any lien or claim which the plaintiff may at any time have had or claimed to have had was claimed and represented by the plaintiff to this defendant to be superior at all times to the liens of this defendant upon the real estate described in the plaintiff's complaint; but said lien was in fact subordinate in time and right to that of this defendant upon the said property and never was of any value whatsoever as against the prior and superior liens and interests of this defendant in and to said property: And at the time the plaintiff alleges it offered to transfer its lien and claim upon said property to this defendant the same had been expressly adjudged by this court to be subordinate and subject to this defendant's liens upon said property: and said judgment still stands unreversed and unmodified and no appeal has ever been taken therefrom and this defendant shows that the plaintiff's alleged lien and claim is not now and never has been of any value whatsoever.

Wherefore the defendant prays judgment that this action be dis-

missed on the merits and it have judgment for its costs herein incurred.

Filed, May 23rd, 1910.

Dated at Phœnix, May 23, 1910.

JOS. H. KIBBEY,
ROBT. E. MORRISON,
Attorneys for Defendant.

17 (Title of Court and Cause.)

Subpœna Duces Tecum.

To M. B. Hazeltine, Cashier of The Bank of Arizona, a corporation, and defendant in the above entitled action, Greeting:

You are hereby commanded, laying aside all business, to appear before the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, on the 23rd day of May, A. D. 1910, at the hour of nine o'clock in the forenoon, to testify and give evidence before said court in the above entitled action on behalf of the plaintiff in said action, and that you bring with you and produce at the time and place aforesaid:

1st. All letters and telegrams or copies thereof written and sent by The Bank of Arizona, a corporation, the defendant in said action by or through any of its officers or its authorized agents in the premises, to the law firm of Armstrong and Lewis, at Phœnix, Arizona, or to Thomas Armstrong and E. W. Lewis, or to either of them, between the first day of October, 1908, and the thirty-first day of December, 1908;

2nd. All letters and telegrams or copies thereof written and sent by M. B. Hazeltine, as Cashier of The Bank of Arizona, a corporation, the defendant in said action, or by M. B. Hazeltine, in his individual capacity, to the law firm of Armstrong and Lewis at

18 Phœnix, Arizona, or to Thomas Armstrong, Jr., or to Thomas Armstrong, or to E. W. Lewis, or to Thomas Armstrong and E. W. Lewis, or to either of them, at Phœnix, Arizona, between the first day of October, 1908, and the thirty-first day of December, 1908;

3rd. All letters and telegrams received by The Bank of Arizona, a corporation, the defendant in said action, or by any of its officers or authorized agents in the premises from the law firm of Armstrong and Lewis or from Thomas Armstrong, Jr., or E. W. Lewis, dated at Phœnix, Arizona, or from elsewhere, between the first day of October, 1908, and the thirty-first day of December, 1908.

Of this fail not under penalty of the law.

Witness the Honorable Edward Kent, Judge of the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, this 25th day of April, A. D. 1910.

[SEAL.] ELIAS F. DUNLEVY, *Clerk.*

SHERIFF'S OFFICE,
Yavapai County, Arizona Territory, ss:

I received the within Subpœna Duces Tecum on the 30th day of April, A. D. 1910, and served the same on the 30th day of April, 1910, by reading this subpœna to the within named M. B. Hazeltine, Cashier of The Bank of Arizona, and by personally
19 delivering to and leaving with him a copy of the same, at the City of Prescott, in Yavapai County, Arizona Territory.

J. W. SMITH,
Sheriff of Yavapai County, Arizona Territory.

Filed May 23, 1910.

Here follows copies of Jury Lists, Statement of Costs and Disbursements and Instructions requested by Plaintiff and Defendant which are omitted by direction of the Attorneys of Plaintiff in error, with the exception of those Instructions marked "Refused" which are in words and figures following to-wit:

Instructions Requested by the Defendant.

It is necessary to the making of every agreement that the minds of the parties must meet, and that all the essential details of the agreement be settled before it can be binding. If therefore you should not be satisfied by a preponderance of the testimony (and the burden here is upon the plaintiff to so satisfy you) that the alleged agreement of promise to pay the plaintiff, was one which was not required to be submitted to the principal, in this case the Bank of Arizona, or its officers, by the attorneys who are alleged to have made it, then it would not be a binding agreement until it had been so submitted and ratified by the Bank, and if in such case there is not sufficient evidence that it was submitted to and ratified by the Bank, then the plaintiff cannot recover and your verdict must be for the defendant.

Refused. E. KENT, *Judge.*

20 The conduct of the parties after the alleged making of the agreement in question as to their understanding whether it had ever been made or not, is of importance in determining the questions before you; and if it should appear to you from the evidence that the plaintiff acted, or neglected to act, in any respect after the alleged making of the agreement so as to indicate that he did not regard the agreement as having been made, or having been made to have been abandoned, you may take this into consideration in determining the question.

Refused. E. KENT, *Judge.*

You will also consider in this case the weight of the testimony on both sides, bearing in mind the frailty of human memory, and the time that has elapsed since the conversations upon which this agree-

ment is based, and although number of witnesses alone is not altogether to determine the matter, this is a thing you may consider, where one witness differs from two others present at the conversation testified to.

Refused. E. KENT, *Judge.*

You are further instructed: "If the jury believe that all the terms of the contract was not finally arranged but that the entire contract was to be arranged and reduced to writing later—there was no binding contract between the parties until a contract is proved to have been made later."

Refused. E. KENT, *Judge.*

Where a written contract is required and is not entered
21 into, there is a failure to accept the contract according to its terms and no recovery can be had.

Refused. E. KENT, *Judge.*

Before the plaintiff can recover in this case it must prove by a preponderance of the evidence that the Attorneys, Armstrong & Lewis, had express authority from their clients to enter into that agreement—that power cannot be inferred from the fact that they were the Attorneys for the Bank.

Refused. E. KENT, *Judge.*

Instructions Requested by Plaintiff.

The Court instructs the jury that an agent may bind his principal within the limits of the authority with which he has apparently been clothed, in respect to the subject-matter of his agency, and for the protection of innocent third persons, the authority of an agent is enlarged by implication when the principal permits the agent to do acts not expressly authorized, and if through inattention or otherwise the principal suffers or allows his agent to act beyond his expressed authority without objection, he is bound to those who are not aware of any want of authority in the agent to the same extent as if the requisite power had been directly conferred by the principal upon the agent.

Refused. E. KENT, *Judge.*

22 THOMAS HAVERTY COMPANY, a Corporation, Plaintiff,
against
THE BANK OF ARIZONA, a Corporation, Defendant.

Verdict.

We the Jury, duly empanneled and sworn in the above entitled action, upon our oaths, do find for the Plaintiff and assess its damages at $9,813.90/100.

SILAS ST. JOHN, *Foreman.*

Filed May 24, 1910.

23 (Title of Court and Cause.)

Judgment.

This action came on regularly for trial on the 23rd day of May, 1910, the plaintiff appearing by *their* attorneys Alexander & Christy and Alfred Franklin, and defendants appearing by *their* attorneys, Joseph H. Kibbey and Robert E. Morrison; a jury of twelve persons were regularly impanelled and sworn to try said action; witnesses on the part of the plaintiff and defendant were sworn and examined; and after hearing the evidence, the argument of counsel, and the instructions of the court, the jury retired to consider of their verdict on the 24th day of May, 1910, and subsequently returned into Court, and being called answered to their names, and say they find a verdict for the plaintiff in the sum of Nine Thousand Three Hundred Thirteen and 90/100 Dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover of and from said defendant the sum of Nine Thousand Three Hundred Thirteen and 90/100 Dollars, with interest thereon at the rate of six per cent per annum from the 18th day of March, 1910, until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to and taxed in the sum of $100.25.

Done in open court this 24th day of May, 1910.

24 EDWARD KENT,
District Judge.

Filed May 25, 1910.

(Title of Court and Cause.)

I, the undersigned Clerk of the District Court of the Third Judicial District of Arizona Territory, in and for Maricopa County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book "I." of said Court, at pages 453-454. And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand, and seal of the District Court, this 25th day of May, A. D. 1910.

[SEAL.] ELIAS F. DUNLEVY, *Clerk*,
By E. S. CURTIS, *Deputy Clerk*.

25 And on to-wit: the 23rd day of November, 1910, came the Appellant by its Attorney and filed in the Clerk's office of said Court, in said entitled cause, certain Plaintiff's Exhibits in words and figures following to-wit:

PLAINTIFF'S EXHIBIT B.

Thomas Armstrong, Jr. F. W. Lewis.

Armstrong & Lewis,
Lawyers.
Nat'l Bank of Arizona Bldg., Phœnix, Arizona.

FEBRUARY 13TH, 1909.

Messrs. Alexander & Christy, Phœnix, Ariz.

GENTLEMEN: We are enclosing you herewith our draft on H. W. Heap, of Prescott, Arizona, for $1976.71, in favor of Foulkes-Gaylord Company, to be used in taking up the judgment of Foulkes-Gaylord Company against John Noble, et al. If you will kindly forward the assignment of judgment to which this draft is attached to your clients, have them execute the same, and send the papers, judgment and draft to Prescott, the draft will be immediately paid.

Very truly yours,

ARMSTRONG & LEWIS.

T. A.—A. G. M.

Filed May 23, 1910.

26 PLAINTIFF'S EXHIBIT C.

Filed May 23, 1910.

This indenture Made the 9th day of March in the year of our Lord, one thousand nine hundred and ten between Thomas Haverty Company, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, State of California, party of the first part, and the Bank of Arizona, a corporation, organized and existing under and by virtue of the laws of the Territory of Arizona, and having its principal place of business at the City of Prescott, Territory of Arizona, party of the second part, Witnesseth:

That whereas, the said party of the first part on the second day of January, 1909, in an action in the district court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, in which the party of the first part, together with Foulkes Gaylord Company were plaintiffs and John Noble, Hugo Richards, H. Albright, Henry W. Ryder, F. A. Munson, W. H. Herman, G. W. & G. I. Bentley, National Bank of Arizona, a Corporation, Arizona Club, a Corporation, Dorris-Heyman Furniture Company, a Corporation, Morris Goldwater and Barry Goldwater, a Co-partnership under the firm name and style of M. Goldwater & Brother, were defendants, recovered judgment against John Noble,

one of the defendants therein, for the sum of Twelve Thou-
27 sand Four Hundred twenty-nine and 22/100 Dollars, with interest thereon at the rate of six per cent per annum from the 28th day of February, 1908, together with costs of suit;

Now, this indenture witnesseth, That the party of the first part, for and in consideration of the sum of Nine Thousand Three Hundred Thirteen and 90/100 Dollars, to it in hand paid, has sold and by these presents does assign transfer, and set over unto the said party of the second part, its successors and assigns, the said judgment aforesaid, and all sum and sums of money that may be had or obtained by means thereof or on any proceedings to be had thereupon, and the said party of the first part does covenant that there is now due on said judgment the said sum of Twelve Thousand four hundred twenty-nine and 22/100 Dollars, together with interest and costs as aforesaid, and that it will not collect or receive the same or any part thereof, nor release nor discharge the said judgment, but will own and allow all lawful proceedings therein and thereon, the said party of the second part saving the said party of the first part harmless of and from any and all costs in the premises.

In witness whereof, the said party of the first part has caused these presents to be executed in its corporate name by its Presi-
dent and Secretary and has caused its corporate seal to be
28 hereto affixed the day and year first above written.

THOMAS HAVERTY CO.,
By THOMAS HAVERTY, *President*,
By ALICE MAHAN, *Secretary*.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Before me Enid Olcott a Notary Public in and for said County, State of California, on this day personally appeared Thomas Haverty, Pres., and Alice Mahan, Sec., of Thomas Haverty Company,

[SEAL.] ENID OLCOTT,
Notary Public in and for the County of Los Angeles, State of California.

known to me to be the persons whose names are subscribed to the foregoing instrument as President and Secretary of the Corporation described in the foregoing instrument, and as such President and Secretary acknowledge to me that they executed the same for said Corporation, for the purpose and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 9th day of
29 March, A. D. 1910.

[SEAL.] ENID OLCOTT,
Notary Public.

My Commission expires, June, 1912.

EXHIBIT D.

Filed May 23, 1910 for identification. Demanded to be introduced in evidence by Plaintiff. Objected to by Defendants. Objection sustained on grounds privileged correspondence.

THE BANK OF ARIZONA,
PRESCOTT, ARIZONA, *December 3rd*, 1908.

Messrs. Armstrong & Lewis, Phœnix, Arizona.

GENTLEMEN: I thought perhaps you should be advised of a little chat we had with Capt. J. L. B. Alexander.

Present Judge Wells, Mr. Alexander and myself.

His object seemed to be the effecting of a compromise in the Haverty Case, he offering to waive all interest, approximately, $800.00 he said, take back the tools, some $1,200.00 and if he insisted upon take out the Heater and deduct some $650.00. Was willing to consider the removing of the Boilers if they could be taken out without injury to the building but of course did not want to take back Boilers as the freight to Los A. would be such an item.

30 From the above and from the further fact that he said that the Richards Judgment was irregular in that it included a $6,000.00 note which was not covered by the Mortgage, of which fact he stated you were aware, and would be attacked and upset if we did not agree to the compromise suggested, we inferred that he did not feel very secure in his lien or rather the security afforded thereby.

He also stated that inasmuch as Haverty was not made a party in the suit of foreclosure (Richards Mortgage) they would have a right of redemption dating from the time of the securing of their Judgment, or something like that.

In the matter of the $6,000.00 note not being secured by the Mortgage Judge Wells declined to discuss the matter, simply referring him to you.

We made no proposition whatever nor did we in any way accede to any he made. Suggested that he work up a deal whereby we should have our money and expense back and settle claim that way.

Very truly yours,

M. B. HAZELTINE, *Chr.*

31 Be it remembered that on to-wit: the 23rd day of November, 1910, came the Appellant in the above entitled cause by its Attorneys and filed in the clerk's office of said court, in said entitled cause, the Transcript of Minute Entries and copy of Supersedeas Bond, in words and figures following to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

THOMAS HAVERTY COMPANY, a Corporation, Plaintiff,
vs.
THE BANK OF ARIZONA, a Corporation, Defendant.

Court Minutes.

Be it remembered, that heretofore and on, to-wit, the 18th day of April, A. D. 1910, the same being one of the regular juridical days of the April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

At this day on the call of the calendar comes the plaintiff by its attorney, and in open Court demands a jury for the trial of this case.

And afterwards and upon, to-wit, the 23rd day of April, A. D. 1910, the same being one of the regular juridical days of the April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

At this day this matter coming on to be heard on the de-
32 murrer of the defendant to the complaint herein, the defendant not urging his demurrer, it is ordered by the Court that the same be, and it is, hereby overruled.

And afterwards and upon, to-wit, the same day, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

At this day it is ordered by the Court that this case be set for trial May 23rd, proximo.

And afterwards and upon, to-wit, the 23rd day of May, A. D. 1910, the same being one of the regular juridical days of the April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

At this day comes Thos. Armstrong, Jr., and in open Court withdraws his appearance as attorney for the defendant, and on his motion it is ordered by the Court that R. E. Morrison, Esq., and Messrs. Kibbey, Bennett & Bennett, be substituted as attorneys for the defendant.

And afterwards and upon, to-wit, the same day, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

33 At this day this matter coming on to be heard upon the demurrer of the defendant, contained in the amended answer

to the complaint herein, is argued by counsel, and the Court being now sufficiently advised in the premises, doth overrule said demurrer.

And afterwards and upon, to-wit, the same day, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

At this day comes the said plaintiff by Messrs. Alexander & Christy, and Alfred Franklin, its attorneys, and the said defendant by R. E. Morrison, Esq., and Messrs. Kibbey, Bennett & Bennett, its attorneys, also comes, and thereupon this cause coming on for trial on the issues herein joined, twenty men are called into the jury box and after the examination of them and the exercise of the peremptory challenges by the respective attorneys, the following named twelve men, viz: F. L. Rankin, J. W. Graham, R. H. Drane, Jas. R. Porter, Jas. Helmer, Silas St. John, Chris. Monihon, J. O. Toney, R. H. Vaughn, Elwood Hadley, T. J. Walker, Ira W. Stalmaker, are duly selected and tried, empaneled and sworn to well and truly try the matter at issue herein between the Thomas Haverty Company, the plaintiff, and the Bank of Arizona, the defendant, and a true verdict give according to the law and the evidence;
34 and thereupon after the opening statements by the plaintiff's attorneys, comes the evidence on behalf of the said plaintiff until the hour of the noon recess and the said jurors are admonished by the Court that it is their duty not to converse among themselves or with any one else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them and are permitted to separate to meet the Court at its next incoming at 1:30 P. M. this day.

And afterwards and upon, to-wit, the same day, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

At this day after the noon recess come again the said parties hereto by their respective attorneys, and the said jurors are called by the Clerk, all answering to their names and being all now here present and in the jury box, thereupon the trial on the issues herein joined is resumed, and thereupon a certain exhibit is offered in evidence by the plaintiff, and the defendant objecting thereto, the said jurors are admonished by the Court that it is their duty not to converse among themselves or with any one else on any subject connected with the trial or to form or express any opinion thereon until the cause is finally submitted to them and are excluded from
35 the Court room during arguments as to introduction of exhibit, after which, and at the conclusion of the arguments of counsel, and the Court, being now sufficiently advised in the premises, doth sustain the objection as to the introduction of said exhibit; and thereupon the said jurors are brought into Court, are called by the Clerk, all answering to their names and being all now here present and in the jury box, comes the further evidence on behalf of the said plaintiff, at the conclusion of which the said jurors are admonished as heretofore and are again excluded from the Court

room and thereupon the defendant by its attorney moves the Court to direct a verdict for the defendant on the grounds of failure of the plaintiff to establish proof of any contract between the plaintiff and the defendant, the motion is argued by counsel and the Court being now sufficiently advised in the premises doth deny said motion, and thereupon the said jurors are again brought into Court, are called by the Clerk, all answering to their names and being all now here present and in the jury box, the trial on the issues herein joined is resumed, and thereupon comes the evidence on behalf of the said defendant, at the conclusion of which, and the hour of adjournment having arrived, the said Jurors are admonished by the Court as heretofore and are permitted to separate to meet the Court at its next incoming at 9:30 A. M. Tuesday, May 24th, instant.

36 And afterwards and upon, to-wit, the 24th day of May, A. D. 1910, the same being one of the regular juridical days of the April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

At this day come again the said parties hereto by their respective attorneys, and the said jurors are called by the Clerk, all answering to their names, and being all now here present and in the Jury Box, the trial on the issues herein joined is resumed, and thereupon the said jurors are admonished by the Court as heretofore, and are excluded from the Court room, and thereupon the said defendant, moves the Court to instruct the Jury to return a Verdict for the defendant, which motion is argued by the defendant's attorneys, and the Court, being now sufficiently advised in the premises, doth deny said motion, and thereupon the said Jurors are brought back into Court, are called by the Clerk, all answering to their names and being all now here present and in the Jury Box, the case is argued to the Jury by the respective Counsel, after which the Court instructs the Jury orally as to the law, the instructions being taken down in shorthand by the official stenographer, after which the said Jurors retire to their Jury Room in charge of two sworn bailiffs to consider of their verdict.

37 And afterwards and upon, to-wit, the same day, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

At this day by consent it is ordered by the Court that the Jurors and bailiffs in this case be furnished with their noon meal, the expense thereof to be taxed as costs against the unsuccessful party.

And afterwards and upon, to-wit, the same day, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

At this day come again the said parties hereto by their respective Counsel, and the said Jurors are brought into Court, are called by the Clerk, all answering to their names and being all now here present and in the Jury Box they by their foreman return into Court

their verdict, which by the Court is ordered to be recorded by the Clerk and is in words and figures as follows, to-wit: "Thomas Haverty Company, a corporation, plaintiff, against The Bank of Arizona, a corporation, defendant.—Verdict—We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff and assess its damages at $9,313.90. Silas St. John, Foreman."

38 And the verdict being so received and recorded is read to the said jurors by the Clerk, and they all replying that it is their verdict it is accepted by the Court and the said Jurors are discharged from the further consideration of this case.

And it is ordered by the Court that a judgment be entered in accordance with such finding, which, when signed by the Court, shall be recorded in the Judgment Book.

And afterwards and upon, to-wit, the 28th day of May, A. D. 1910, the same being one of the regular juridical days of the April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

At this day it is ordered by the Court that the defendant's motion for a new trial herein be continued for hearing until June 4th, proximo.

And afterwards and upon, to-wit, the 4th day of June, A. D. 1910, the same being one of the regular juridical days of the April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

39 At this day this matter coming on to be heard upon the motion of the defendant for a new trial herein, is argued by counsel and submitted to the Court for its further consideration.

And afterwards and upon, to-wit, the 11th day of June, A. D. 1910, the same being one of the regular juridical days of the April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

This matter having been heretofore submitted to the Court upon the motion of the defendant for a new trial herein, and the defendant's amended motion for a new trial, and by the Court taken under advisement, and the Court having considered the same, and being now sufficiently advised in the premises, doth deny said motion.

And afterwards and upon, to-wit, the same day, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

At this day it is ordered by the Court that the defendant herein have until June 20th, instant, in which to file a bill of exceptions herein.

And afterwards and upon, to-wit, the 22nd day of June, A. D. 1910, the same being one of the regular juridical days of the
40 April Term, A. D. 1910, of said Court, the following order was had and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

At this day comes the defendant by its attorney, and in open Court gives notice of its appeal to the Supreme Court of Arizona, from the judgment rendered against it herein, and the order denying its motion for a new trial.

And afterwards and upon, to-wit, the 19th day of October, A. D. 1910, there was filed in the Clerk's office of said Court in said cause, a supersedeas appeal bond, which said appeal bond, with the endorsements thereon, is in words and figures as follows, to-wit:

Appeal Bond.

In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

THOMAS HAVERTY COMPANY, Plaintiff,
vs.
BANK OF ARIZONA, Defendant.

Know all men by these presents: That we, the Bank of
41 Arizona, the defendant in the above entitled cause, as principal, and Hugo Richards and M. B. Haseltine, as sureties, are bound unto the Thomas Haverty Company, the plaintiff in the above entitled cause, in the penal sum of Twenty Thousand ($20,000) Dollars, to the payment whereof well and truly to be made we hereby bind ourselves, our heirs, executors, administrators and successors firmly by these presents.

Witness our hands and seals this 18th day of October, 1910.

The conditions of the above obligation are that,

Whereas, The above named plaintiff, the Thomas Haverty Company, in a suit in the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County then pending, entitled Thomas Haverty Company, Plaintiff, versus Bank of Arizona, Defendant, did on the 24th day of May, 1910, the same being a regular juridical day of the April Term 1910 of said Court, recover a judgment against the said above bound Bank of Arizona for the sum of Nine Thousand Three Hundred Thirteen Dollars and Ninety Cents ($9,313.90) and interest from March 18th, 1910, at the rate of six per cent per annum in damages, and costs by the plaintiff in and about said suit laid out, incurred and ex-
42 pended, and taxed at One Hundred Dollars and Twenty-five Cents ($100.25), and

Whereas the above bound Bank of Arizona, defendant as aforesaid in said cause, has appealed from said judgment of said Court in

said cause, and from the order of said Court, denying the said defendant's motion for a new trial of said cause, to the Supreme Court of the Territory of Arizona, and

Whereas the Clerk of said District Court whence said appeal is taken has fixed the probable amount of the costs of said suit, both of said Supreme Court and of the said District Court at the sum of Two Hundred ($200.00) Dollars.

Now, therefore, if the said above bound Bank of Arizona, appellant as aforesaid shall prosecute its said appeal with effect and in case the judgment of the said appellate court is against it in said cause it shall perform its judgment, sentence and decree, and pay all such damages as may be awarded against it upon the appeal, then this obligation shall be null and void, but otherwise it shall be and remain in full force and effect.

THE BANK OF ARIZONA,
M. B. HAZELTINE, *Cashier.*
HUGO RICHARDS.
M. B. HAZELTINE.

43 TERRITORY OF ARIZONA,
County of Yavapai, ss:

Personally appeared before me, the undersigned, a Notary Public, in and for said County and Territory, this 18th day of October, 1910, the above named sureties, Hugo Richards and M. B. Hazeltine, who, each of them, being by me first duly sworn, on his oath, each for himself and not one for the other, deposes and says, that he is worth Twenty Thousand ($20,000) Dollars above his just debts and liabilities exclusive of property exempt from execution.

HUGO RICHARDS.
M. B. HAZELTINE.

Witness my hand and seal the day and year last above written.

[SEAL.] ALLEN HILL,
Notary Public.

My commission expires June 23rd, 1911.

Endorsements: No. 5942. In the District Court of Maricopa County, Territory of Arizona. Thomas Haverty Company, Plaintiff, vs. Bank of Arizona, Defendant. Appeal Bond. Filed and Approved Oct., 19, 1910. Elias F. Dunlevy, Clerk. By E. S. Curtis, Deputy. R. E. Morrison, Kibbey, Bennett and Bennett, Fleming Block, Phoenix, Arizona Attorneys for Defendant.

44 TERRITORY OF ARIZONA,
County of Maricopa, ss:

I, Elias F. Dunlevy, Clerk of the District Court of the Third Judicial District of the Territory of Arizona, in and for said County, do hereby certify that the above and foregoing contains a true copy of all minute entries made in the above entitled cause, and of the

Supersedeas Bond on Appeal, and that the papers transmitted herewith are all the papers constituting the record of the cause.

Witness my hand and the seal of said Court, this 9th day of November, A. D. 1910.

[SEAL.] ELIAS F. DUNLEVY,
Clerk of said District Court.

Be it remembered that on to-wit: the 23rd day of November, 1910, came the Appellant in the said entitled cause by its Attorneys and filed in the clerk's office of said court, in said entitled cause, Motion for New Trial, Amended Motion for New Trial and Defendant's First Bill of Exceptions, in words and figures following to-wit:

(Title of Court and Cause.)

Motion for New Trial.

Comes now the defendant and moves the Court to set aside
45 the verdict herein, and to grant the defendant a new trial, and for causes thereof says:

I.

That the verdict is not sustained by the evidence.

II.

That the verdict is contrary to the evidence.

III.

That the verdict is contrary to the law.

IV.

Because the Court erred in charging the jury, and in refusing instructions asked by the defendant.

V.

Because the Court erred in admitting incompetent evidence offered by the plaintiff over the objection of the defendant.

VI.

Because of the misconduct of one of the attorneys for the plaintiff during the trial of said cause in this, to-wit, that during his argument of the cause to the jury, one of the attorneys
46 for the plaintiff said to the jury, as part of his said argument, substantially, "The fact that Armstrong & Lewis, attorneys for the defendant had authority to enter into the agreement (meaning the agreement set up in the Complaint) from their client (meaning defendant herein), might perhaps be proved by letters that may have passed between them, that we meaning the plaintiff

tried to get these letters, but they (meaning counsel for defendant) refused to produce them upon the ground that they were privileged because they were communications between the attorney and client, and the Court so ruled; we therefore had to resort to other evidence as to the contract of the parties etc., etc."

To which language the defendant at the time objected as not being proper matter for comment to the jury.

Dated at Phœnix, May 24th, 1910.

KIBBEY, BENNETT & BENNETT,
ROBERT E. MORRISON,
Attorneys for Defendant.

Filed May 26, 1910.

47 Title of Court and Cause.

Amended Motion for New Trial.

Filed June 11, 1910.

Comes now the defendant and for Amended Motion for New Trial moves the Court to set aside the verdict herein, and to grant the defendant a new trial, and for causes thereof says:

I.

That the verdict is not sustained by the evidence.

II.

That the verdict is contrary to the evidence.

III.

That the verdict is contrary to the law.

IV.

Because the Court erred in charging the jury, and in refusing instructions asked by the defendant.

V.

That the Court erred in denying defendant's motion made at the conclusion of the evidence of the plaintiff to instruct the jury to find for the defendant.

VI.

48 That the Court erred in denying defendant's motion made at the conclusion of all its evidence in the case, to instruct the jury to find a verdict for the defendant.

VII.

Because the Court erred in admitting incompetent evidence offered by the plaintiff over the objection of the defendant.

VIII.

Because of the misconduct of one of the attorneys for the plaintiff during the trial of said cause in this, to-wit, that during his argument of the cause to the jury, one of the attorneys for the plaintiff said to the jury as part of his said argument substantially, "The fact that Armstrong & Lewis, attorneys for the defendant, had authority to enter into the agreement (meaning the agreement set up in the Complaint) from their client (meaning defendant herein) might perhaps be proved by letters that may have passed between them, that we—meaning the plaintiff—tried to get these letters but they (meaning counsel for defendant) refused to produce them upon the ground that they were privileged because they were communications between the attorney and client, and the Court so ruled we therefore had to resort to other evidence as to the contract of the parties, etc., etc." To which language the defendant at the time objected as not being proper matter for comment to the jury.

Dated this 10th day of June, 1910.

ROBERT E. MORRISON,
KIBBEY, BENNETT & BENNETT,
Attorneys for Defendant.

49 Title of Court and Cause.

Defendant's First Bill of Exceptions.

Be it remembered that on the 24th day of May, 1910, the same being a regular juridical day of the April Term of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, and while the trial of the above entitled cause was in progress and while J. L. B. Alexander, one of the Attorneys for the plaintiff herein, was arguing the case to the jury, the said Alexander said to the jury then present, and as a part of his said argument substantially:

"The fact that Armstrong and Lewis, Attorneys for the defend-
"ant, had authority to enter into this agreement (meaning the
"agreement set up in the Complaint) from their client (meaning
"the defendant herein) might perhaps be proved by letters that
"may have passed between them. We (meaning the plaintiff)
"tried to get these letters, but they (meaning counsel for the de-
"fendant) refused to produce them upon the ground that they
"were privileged because they were communications between at-
"torney and client, and the Court so ruled. We therefore have to
"resort to other evidence, as to the conduct of the parties, etc.,
"etc."

50 To which language and the utterance thereof in the presence of the jury the defendant then and there instantly objected, as the fact that it refused to produce letters that had passed between attorney and client, which constituted privileged communications, was not a proper subject for comment by counsel to the jury. That the court thereupon said, "Yes—of course the jury can draw no inference from their non-production of the letters."

And be it further remembered that on the 28th day of May, 1910, the said defendant filed its written motion for a new trial of said cause.

And be it further remembered that on the 11th day of June, 1910, the defendant filed in said Court its amended motion for a new trial of said cause.

And be it further remembered that on the 11th day of June, 1910, the same being a regular juridical day of said Term of said Court, the said Court being then sufficiently advised in the premises, overruled and denied said motion for a new trial, to which ruling of the court in so denying its said motion for a new trial the defendant then and there excepted and time was given, to-wit, ten days from said 10th day of June, 1910, within which to prepare and file its bill of exceptions.

And now, to-wit, on this 17th day of June, 1910, the de-
51 fendant presents this, its bill of exceptions, and asks that the same may be allowed, signed and filed as a part of the record of this cause, which is now done.

EDWARD KENT.

Dated June 17th, 1910.
Filed June 17th, 1910.

And on to-wit: the 23rd day of November, 1910, came the Appellany by its Attorneys and filed in the Clerk's office of said court, in said entitled cause, Defendant's Second Bill of Exceptions in words and figures following to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

No. 5942.

THOMAS HAVERTY COMPANY, Plaintiff,

vs.

BANK OF ARIZONA, Defendant.

Tried at Phoenix, Arizona, May 23rd and 24th, 1910, before the Court and a jury, the Honorable Edward Kent, Judge, presiding.

Messrs. Alexander and Christy and Alfred Franklin for the plaintiff.

Messrs. Joseph H. Kibbey and Robert E. Morrison for the defendant.

52 MONDAY, May 23rd, 1910.

On this day, this being the time heretofore fixed by the Court for the trial of this cause, came the plaintiff and defendant hereto by their respective counsel, Messrs. Alexander and Christy and Alfred Franklin for the plaintiff, and Messrs. Joseph H. Kibbey and Robert E. Morrison for the defendant, and thereupon the following proceedings are had herein to-wit:

The COURT: You may call a jury for this case Mr. Clark.

Mr. KIBBEY: If it please the Court, we have a demurrer to the complaint which should be determined before the case is tried.

The COURT (examining papers): What is the reason why the first cause of action is not good?

Mr. KIBBEY: It alleges, in reciting the pendency of the suit that the plaintiff in that case—also the plaintiff in this case—was to prosecute that action to judgment—a claim of $14,000.00—and that we were the purchaser for $9,000.00. They allege a special contract and in fact they do not allege performance themselves.

Mr. FRANKLIN: We allege in that complaint that we have a claim of lien on a certain building in this city, and that at a certain time this defendant purchased that claim of lien with the understanding and agreement that we were to prosecute that claim of lien to
53 judgment and thereafter assign it to the defendant. We prosecuted the claim to judgment in our name.

Mr. KIBBEY: They say they had a claim for $14,000.00 and they recovered judgment for $12,000.00.

Mr. ALEXANDER: We sold you a claim: it was not specified what the amount was.

The COURT: There is a general allegation of performance.

Mr. KIBBEY: Suppose they alleged they had a claim for $14,000.00 and that they would prosecute that claim to judgment, and then sold it to us—suppose it goes to judgment for $5,000.00?

The COURT: I shouldn't think the amount of the judgment would make any difference. I understood you to say they did not perform. * * *

Mr. KIBBEY: They do allege it, but they also allege that they recovered the judgment for $12,000.00. That is not in accordance with the amount they allege—it would either be $14,000.00 or $9,000.00—a claim of $14,000.00 is not one for $12,000.00.

Mr. ALEXANDER: We didn't sell you any judgment: we sold you a claim.

Mr. KIBBEY: That is true, but it was to be reduced to judgment—and it was reduced to judgment for $12,000.00, and there is a failure of the contract to that extent.

The COURT: I don't quite understand. The Haverty Company had a claim against the Noble Building for $14,000.00 and
54 the Bank of Arizona was to purchase the claim provided the Haverty Company would reduce it to judgment. Now your point is that if they did not get judgment for $14,000.00 the purchase was invalid?

Mr. KIBBEY: Yes.

The COURT: Why?

Mr. KIBBEY: They said they had a demand for $14,000.00. Now if they did not reduce it to a judgment for that amount——

The COURT: They said they had a demand? (To Mr. Alexander.) The basis was that you had a valid claim?

Mr. ALEXANDER: No, we don't plead anything of the sort.

The COURT: I am talking about the legal inference. They don't

allege in this complaint that they will reduce it to judgment for the amount of the claim: they allege they will prosecute it to judgment.

Mr. KIBBEY: They were to prosecute it to judgment for the amount sued for.

The COURT: It does not say so in the complaint at least. It may be true.

Mr. KIBBEY: Judgment of the court was that they did not have a claim for $14,000.00.

The COURT: So far as this complaint is concerned, it seems to me that if they prosecuted the claim to judgment and got one dollar it would be valid so far as this complaint is concerned. I overrule the demurrer. (To the Clerk) Call a jury for the trial of this case.

55 The CLERK: Jurors as their names are called will come forward and take seats in the jury box: E. E. Jack, F. L. Rankin, Thomas McGrath, J. W. Graham, Ed A. Sheets (Does not answer.) E. J. Doyle, M. L. Gibbons, R. H. Drane, W. G. Tollinson (Does not answer.)

The COURT: You may set aside those who do not answer.

The CLERK (continuing): James R. Porter, James Helmer, Silas St. John, E. A. Spaulding, Chris Monihon, J. O. Toney, R. H. Vaughn, C. E. Holland, Carter Kniveton, Irving L. Hill, Elwood Hadley, T. J. Walker, Ira W. Stalnaker. Jurors rise and be sworn. You and each of you do solemnly swear that you will true answers make to such questions as may be to you propounded touching your qualifications as trial jurors in the case about to be submitted to you, so help me God.

Mr. ALEXANDER (to jurors): In order that you may be able to answer questions in regard to your qualifications. I will state the nature of the case to you. This is an action by the Thomas Haverty Company against the Bank of Arizona, a banking corporation that does business in Prescott, of which Mr. Hazeldine, to my left is cashier—brought against this bank upon a promise, or alleged promise, or upon an offer of purchase of a lien or claim for a lien that the Haverty Company had upon this Noble building here in the year 1907, in which it is alleged in the complaint that this bank or their agents offered to purchase for a certain amount of money, and that offer was accepted by the Haverty Company, and that they refused to pay it and we have sued for it.

56 E. E. JACK, is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

Mr. ALEXANDER:

Q. You live in Alhambra, Mr. Jack?
A. Yes sir. Just beyond.
Q. You are a farmer?
A. Yes sir.
Q. Do you know anything about this case, other than I have just stated?

A. I believe I saw something stated in the paper.
Q. You read something about it in the paper?
A. Yes sir.
Q. At the time the suit was brought?
A. I don't know when it was.
Q. Do you know Mr. Haverty here?
A. No sir.
Q. Do you know Judge Wells?
A. No sir.
Q. Do you know anything else about the case other than what you saw in the paper or heard me state here?
A. No sir.
Q. Do you know Thomas Armstrong?
A. Yes sir.
Q. Is he your attorney in any manner?
A. No sir.
Q. Has he ever been?
57 A. I believe I consulted him once.
Q. You consulted him once—How long ago?
A. Number of years ago.
Q. You have no relation as client and attorney now between you?
A. No sir.
Q. You feel in this case, Mr. Jack, that you could sit as a juror and try the case with entire fairness and impartiality between the parties?
A. I think I could.
Q. And that you have no desire on your part—The fact is you feel indifferent as to who succeeds—you feel perfectly indifferent as to who succeeds in the case?
A. Yes sir.

Mr. ALEXANDER: Pass him.
Mr. MORRISON: Pass him.
Mr. ALEXANDER: I forgot to ask you if Judge Kibbey is your counsel in any matter.
The JUROR: No sir.

F. L. RANKIN, is called by the clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Where do you live?
A. East of Tempe.
Q. You are a farmer there?
A. I am in the stock business.
58 Q. Do you know anything about the facts in this case, Mr. Rankin, other than what I have stated?
A. I do not.
Q. Do you know Mr. Haverty?
A. No.
Q. Mr. Hasseldine?

A. I have seen him—I would not know * * *
Q. Do you know Judge Wells?
A. I have seen him.
Q. Did you ever have any business relations?
A. None whatever.
Q. None existing between you and them, the Bank of Arizona?
A. No, sir.
Q. Do you know Thomas Armstrong?
A. I do not.
Q. Do you know Judge Kibbey?
A. I know him when I see him.
Q. No relations as client and attorney between you?
A. None whatever.
Q. Never have been?
A. No sir.
Q. You feel that you could sit as a juror and try this case fairly and impartially?
A. I believe I could.
Q. You are perfectly indifferent at this time as to who succeeds?
59 A. Yes sir.

Mr. ALEXANDER: Pass him.
Mr. MORRISON: Pass him.

THOMAS MCGRATH is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know anything about the facts of this case other than what I have stated.
A. No sir.
Q. Do you know Thomas Haverty?
A. No, sir.
Q. Mr. Hasaldine?
A. Yes sir.
Q. Judge Wells?
A Yes sir.
Q. Any relations existing between you or either of them?
A. No sir.
Q. Has there ever been?
A. No sir.
Q. Have you ever had ny business relations with the Bank of Arizona at Prescott?
A. No sir; I can't say that I have.
60 Q. Do you know Mr. Armstrong?
A. Yes sir.
Q. Have any business relations with him as client and attorney?
A. Yes sir.
Q. Now existing between you?
A. Well he is examining some abstracts for me.

Q. Lately?
A. Yes sir.
Q. Judge Kibbey—do you know him?
A. Yes sir.
Q. Any relation between you and him as attorney and client?
A. No sir.
Q. Now, Mr. McGrath, you feel that you could sit as a juror and try this case fairly and impartially?
A. Yes sir.
Q. You are entirely indifferent, are you, as to who shall succeed?
A. Yes sir.
Q. You know of no reason why you cannot sit as a juror?
A. No sir.

Mr. ALEXANDER: Pass him.

Mr. MORRISON:

Q. Do you know Mr Haverty?
A. No sir.

Mr. MORRISON: Pass him.

61 J. W. GRAHAM is called by the Clerk and having been duly sworn to answer questions as to his qualifications as trial juror is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No.
Q. Know Mr. Hazeldine?
A. No sir.
Q. Judge Wells?
A. No.
Q. Do you know anything about the facts of this case other than what I have related here?
A. No.
Q. Do you feel that you could try the case fairly and impartially between the parties?
A. Yes sir.
Q. You feel entirely indifferent as to who succeeds?
A. Yes sir.

Mr. ALEXANDER: Pass him
Mr. MORRISON: Pass him.

E. J. DOYLE is called by the Clerk and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Thomas Haverty?
A. No sir.
Q. Know Mr. Hazeldine?

A. No sir.
Q. Judge Wells?
62 A. No sir.
Q. Do you know anything about the facts of this case other than what I have related?
A. No sir.
Q. Do you feel that you can sit as a juror here and try this case with entire fairness and impartiality?
A. Yes sir.
Q. You are entirely indifferent as to who succeeds?
A. Yes sir.

Mr. ALEXANDER: Pass him.
Mr. MORRISON: Pass him.

M. L. GIBBONS is called by the Clerk and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. You reside where, Mr. Gibbons?
A. Mesa.
Q. You are in business there? A merchant?
A. Yes sir.
Q. How long have you resided there?
A. Off and on for twelve or thirteen years.
Q. You know Thomas Haverty?
A. No sir.
Q. Know Mr. Hazeldine?
A. No sir.
Q. Judge Wells?
A. No.
Q. Any business relations between you and the Bank of Arizona?
A. No sir.
Q. Know anything about the facts of this case?
A. No sir.
68 Q. You feel that you can sit as a juror and try the case fairly and impartially between the parties?
A. Yes sir.
Q. You feel perfectly indifferent as to who succeeds here?
A. Yes sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. What is your business, Mr. Gibbons?
A. Drugs.
Q. In what establishment.
A. Everybody's Drug Store.
Q. Who are the parties interested in that business?
A. Dr. Palmer and myself.

Q. That is at Mesa?
A. Yes sir.

Mr. MORRISON: Pass him.

R. H. DRANE is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Know Mr. Haseldine?
A. No sir.
Q. Know Judge Wells?
A. I do.
Q. Do you know anything about the facts of this case?
A. No sir.
Q. You feel that you could sit as a juror and try the case fairly and impartially?
A. I think I could.
Q. You are entirely indifferent as to who succeeds here?
A. Yes sir.

64 Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. Are you acquainted with Mr. Haverty?
A. No sir.
Q. Don't know him at all?
A. No sir.

Mr. MORRISON: Pass him.

JAMES R. PORTER is called by the Clerk and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Mr. Haseltine?
A. No sir.
Q. Judge Wells?
A. No sir.
Q. You are in business here in town?
A. Yes sir.
Q. Have you any business relations with the Bank of Arizona at Prescott?
A. No sir.
Q. Know anything about the facts of this case?
A. No sir.

Q. You feel that you could sit as a juror and try this case fairly and impartially between the parties?
A. Yes sir.
Q. You feel entirely indifferent as to who succeeds?
A. Yes sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. Where do you live?
A. In Phœnix.
Q. How long have you lived here?
A. About ten years, altogether.
Q. What is your occupation?
A. Harness business.
Q. Harness business?
A. Yes sir, I am in that with my two brothers.
Q. You are not acquainted with Mr. Haverty?
A. No sir.
Q. You have no interest in this suit at all?
A. No sir.
Q. No desire as to which way a verdict should be rendered at this time?
A. No sir.

Mr. MORRISON: Pass him.

JAMES HELMER, is called by the Clerk and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Where do you live?
A. Here in town.
Q. What is your business?
A. Mining.
Q. Do you know Mr. Haverty?
A. No sir.
Q. Know Mr. Hazeldine of Prescott?
A. No sir.
Q. Judge Wells?
A. No sir.
Q. Have you ever lived in Prescott?
A. No sir, I have visited there.
Q. Do you know anything about the facts in this case?
A. No sir.
Q. You feel, Mr. Helmer, that you could sit as a juror and try this case fairly and impartially between these parties?
A. Yes sir.
Q. You feel perfectly indifferent as to who succeeds?
A. Perfectly.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. Where are you engaged in mining?
A. In this county.
Q. This county?
A. Yes sir.
Q. For yourself?
A. Yes sir.
Q. That is, you are the owner of mining property?
A. Secretary of a company.
Q. How long have you lived in this county?
A. A little over six years.
Q. Where are you from?
A. Chicago.

Mr. MORRISON: Pass him.

SILAS ST. JOHN is called by the Clerk and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. I do not.
Q. Mr. Haseldine?
A. No sir.
Q. Judge Wells?
A. I do.
Q. Are there any business relations existing between you and Judge Wells?
A. None whatever.
Q. Never have been?
A. No.
Q. Do you know the Bank of Arizona of Prescott?
A. No.
Q. Do you know anything about the facts of this case, Mr. St. John?
A. Nothing but what you said.
Q. You feel that you could sit as a juror here and try this
67 case fairly and impartially between these two parties?
A. I do.
Q. You feel perfectly indifferent as to who succeeds?
A. Yes sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. Are you acquainted with Mr. Haverty?
A. I am not.
Q. You don't know him at all?
A. No sir.

Mr. MORRISON: Pass him.

E. A. SPAULDING is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined as follows by counsel:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Mr. Haseldine?
A. No sir.
Q. Judge Wells?
A. Not intimately.
Q. Have you ever had any business relations with those parties?
A. No sir.
Q. Do you know anything about the facts of this case Mr. Spaulding?
A. No sir, except what I have heard stated here.
Q. You feel that you could sit as a juror here and try the case fairly and impartially between the parties?
A. Yes sir.
Q. You have no desire as to who shall succeed?
A. No sir.
Q. You are perfectly indifferent in that respect?
A. Yes sir.

68 Mr. ALEXANDER: Pass him.

Mr. MORRISON: Pass him.

CHRIS MONTHON is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Thomas Haverty?
A. No sir.
Q. Know Mr. Haseldine?
A. No sir.
Q. Judge Wells?
A. No sir.
Q. Do you know anything about the facts of this case?
A. No sir.
Q. Do you know of any reason why you can't sit on this jury and try the case fairly and impartially?
A. No sir.
Q. You feel perfectly indifferent as to who succeeds?
A. Yes sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. Have you any acquaintanceship with Mr. Haverty?
A. No sir.
Q. You don't know him at all?

A. Not that I know.

Mr. Morrison: Pass him.

J. O. Toney is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. Alexander:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Mr. Haseldine?
A. No sir.
—. Judge Wells?
A. No sir.
69 Q. Do you know the Bank of Arizona at Prescott?
A. No sir.
Q. Do you know anything about the facts of this case?
A. No sir.
Q. You feel that you could sit here as a juror, Mr. Toney, and try this case fairly and impartially between the parties?
A. Yes sir.
Q. You are perfectly indifferent as to who succeeds?
A. Perfectly.

Mr. Alexander: Pass him.

By Mr. Morrison:

Q. What is your occupation?
A. Right at present it is prospecting.
Q. Mining is your general business?
A. Right at present.
Q. Where have you mined chiefly?
A. In the Black Canyon some.
Q. How long have you lived in this county?
A. About ten years.
Q. You are not acquainted with Mr. Haverty?
A. No sir.
Q. And you are not interested in this suit at all.
A. Not at all.

Mr. Morrison: Pass him.

R. H. Vaughn is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. Alexander:

Q. Do you know Mr. Haverty?
A. I do not.
Q. Know Mr. Haseldine?
A. No sir.
—. Judge Wells?

A. No sir.

70 Q. Do you know anything about the facts of this case?

A. None whatever.

Q. You feel perfectly indifferent as to who succeeds here?

A. Yes sir.

Q. Do you know any reason why you would not make a fair and impartial juror in the trial of this case?

A. No sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. How long have you lived here?

A. Ten years.

Q. What is your occupation?

A. Farmer.

Q. Where?

A. North Central Avenue.

Q. Do you know Mr. Haverty?

A. No sir.

Mr. MORRISON: Pass him.

C. E. HOLLAND is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?

A. No sir.

Q. Mr. Haseldine.

A. No sir. I know of him. No personal acquaintanceship.

Q. Do you know Judge Wells?

A. Yes sir.

Q. Did you ever have any business with them?

A. No sir, I just know who they are.

Q. No business with them.

A. No sir.

Q. Do you know the Bank of Arizona at Prescott?

A. I have just heard of it: I don't know it.

Q. You have never had any business with it.

A. No sir.

71 Q. Do you feel that you could sit as a juror and try this case fairly and impartially?

A. Yes sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. What is your occupation?

A. Manager of Dorris' grocery.

Q. You have no interest in this case?

A. No sir.

Q. You have never heard of the alleged facts before?
A. No sir.

Mr. Morrison: Pass him.

Carter Kniveron is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror is examined by counsel as follows:

By Mr. Alexander:

Q. You live here in town?
A. Yes sir.
Q. Do you know Thomas Haverty?
A. No sir.
Q. Do you know Mr. Hazeldine?
A. No.
Q. Judge Wells?
A. I believe I have seen them.
Q. Never had any business dealing with them?
A. No sir.
Q. Do you know anything about the facts of this case?
A. I do not.
Q. You feel that you could sit as a juror here and try this case fairly and impartially between the parties?
A. I do.
Q. You feel perfectly indifferent as to who shall succeed?
A. I do.

72 Mr. Alexander: Pass him.

By Mr. Morrison:

Q. Where do you live?
A. Phoenix.
Q. How long have you lived here?
A. Going on seven years.
Q. And your occupation?
A. I haven't any at present.
Q. What is your business generally?
A. Doing most anything I could get to do. I have worked at the sheriff's office some—not lately—not for a year.
Q. What was your last answer?
A. I have been employed at the sheriff's office some, but not lately.
Q. How long have you lived in the territory?
A. Going on seven years.
Q. You came to Phoenix and have lived here ever since you came to the territory?
A. Yes sir.
Q. You have been associated with the sheriff's office?
A. Yes sir.
Q. As an officer?
A. Yes sir.
Q. A deputy sheriff?
A. Yes sir, I have been appointed special there several times.

Q. But you are not associated with the sheriff's office now in any way?
A. No sir, not for over a year.
Q. You know nothing about this case, however?
A. No nothing at all about it.
78 Q. You are not acquainted with Mr. Haverty?
A. No I don't think so.

Mr. MORRISON: Pass him.

IRVING L. HILL is called by the Clerk and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Or Mr. Haseldine or Judge Wells?
A. No sir.
Q. Do you know anything about the facts in this case?
A. No sir.
Q. I ask you if you know Judge Kibbey and Mr. Armstrong?
A. Yes sir.
Q. Is either of those attorneys your attorney in any matter?
A. No sir.
Q. Do you know anything about the facts of this case?
A. Nothing whatever.
Q. You feel that you could sit as a juror in this case and try it fairly and impartially between the parties?
A. I think so.
Q. You feel entirely indifferent as to who succeeds?
A. Yes sir.
Q. You have no desire as to who shall prevail?
A. No sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. Mr. Hill, does the relationship of client and attorney
74 exist between you and Mr. Alexander?
A. No sir.
Q. Or with Captain Christy?
A. No sir.
Q. Or with Mr. Franklin?
A. No sir. I have consulted Captain Christy, but have never used him in any way.
Q. How long since?
A. About two years ago.
Q. But at the present time there is no relationship of that character?
A. No sir.
Q. What is your occupation?

A. Seed merchant.
Q. Here in town?
A. Yes sir.
Q. Do you know Mr. Haverty?
A. I do not.
Q. You have no interest in this case in any way?
A. No sir.

Mr. MORRISON: Pass him.

ELWOOD HADLEY is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Do you know Mr. Hazeldine?
A. No sir.
Q. Judge Wells?
A. No sir.
Q. Do you know anything about the facts of this case, Mr. Hadley?
A. No sir.
Q. Do you know of any reason why you cannot sit as a
75 juror here and try this case fairly and impartially between the parties?
A. I don't know of anything.
Q. You feel entirely indifferent as to who prevails here?
A. Yes sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. You are not acquainted with Mr. Haverty, I understand you to say?
A. No sir.
Q. You have no interest in this case?
A. No sir.
Q. You have never talked to any persons who claimed to know the facts?
A. No sir.
Q. Therefore you have no desire one way or the other as to how the verdict should be rendered at this time?
A. No sir.

Mr. MORRISON: Pass him.

T. J. WALKER is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined by counsel as follows:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Do you know Mr. Hazeldine?
A. No sir.
Q. Know Judge Wells?
A. Slightly acquainted.
Q. Has any business ever occurred between you and Judge Wells?
A. Not in the last ten years.
Q. How long have you known him?
A. Quite a while by sight.
Q. Did you know him at Prescott?
A. No sir.
Q. Here?
A. Yes sir.
76 Q. Do you know anything about the facts of this case?
A. I do not.
Q. Do you know any reason that would preclude your acting as a juror and trying this case fairly and impartially between the parties?
A. I do not.
Q. You feel perfectly indifferent as to who succeeds?
A. Yes sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. What is your occupation?
A. Livery business.
Q. Do you know Mr. Haverty at all?
A. No sir.
Q. You have no interest in this case in any way?
A. No sir.

Mr. MORRISON: Pass him.

IRA W. STALNAKER is called by the Clerk, and having been duly sworn to answer questions as to his qualifications as trial juror, is examined as follows by counsel:

By Mr. ALEXANDER:

Q. Do you know Mr. Haverty?
A. No sir.
Q. Mr. Hazeldine?
A. No sir.
Q. Judge Wells?
A. No sir.
Q. Do you know anything about the facts in this case?

A. No sir.

Q. Do you know of any reason why you cannot sit as a juror here and try this case fairly and impartially between the parties?

A. I do not.

Q. You have no interest as to who shall succe-d here?

77 A. No sir.

Mr. ALEXANDER: Pass him.

By Mr. MORRISON:

Q. What is your occupation?

A. Conductor for the Phœnix Railway Company.

Q. How long have you lived here?

A. A little over three years.

Mr. MORRISON: Pass the juror.

Thereupon this completing the examination of the panel, the jury list is handed to counsel, and after counsel for the plaintiff and defendant have exercised their p-remptory challenges, the list is returned to the Clerk, who announces that the following jurors have been selected to constitute the jury for the trial of this cause: F. L. Rankin, J. W. Graham, R. H. Drane, James R. Porter, James Helmer, Silas St. John, Chris Monihon, J. O. Toney, R. H. Vaughn, Elwood Hadley, T. J. Walker and Ira W. Stalmaker.

And after the jurors not selected have retired from the jury box, the Clerk calls the names of the aforesaid jurors selected to try the case, all answering to their names and all being present and in the jury box, whereupon the following proceedings are had to wit:

The CLERK: Now rise and be sworn, gentlemen of the jury. (Jurors rise.) You and each of you do solemnly swear that you will well and truly try the matter at issue herein between Thomas Haverty Company, plaintiff, and the Bank of Arizona, defendant, and a true verdict render according to the law and the evidence, so help you God.

Mr. ALEXANDER: Before we proceed I desire to state that I have caused a subpœna duces tecum to be served upon Mr. Hazeldine to produce certain letters and correspondence between himself and the Bank and Armstrong & Lewis, attorneys for this defen-

78 dant, and I would like to know now if he has those letters here.

Mr. MORRISON: No sir.

Mr. ALEXANDER: I also issued a subpœna duces tecum and had it served upon Mr. Armstrong to produce certain letters between Armstrong & Lewis and this defendant corporation relative to this matter. I would like to know if he has those letters with him.

Mr. MORRISON: No sir.

Mr. ALEXANDER: Now, I want to know why they do not produce them—the correspondence between the bank and these attorneys in reference to this matter.

Mr. MORRISON: This raises a legal question that we want to discuss

out of the presence of the jury, if it is to be discussed at all. They are privileged communications.

The COURT: If they do not bring them you are entitled to put in secondary evidence.

Mr. ALEXANDER: We can't very well put in secondary evidence. Some of the correspondence we haven't seen.

The COURT: You may proceed with the case, and when you get your witnesses on the stand that will be the time to inquire into the matter.

(Thereupon Mr. Franklin makes a statement on the plaintiff's case to the jury.)

Mr. ALEXANDER: We desire to introduce in this case the judgment roll in the case of Thomas Haverty Company, a corporation, and the Foulkes-Gaylord Company, a corporation, plaintiffs, against John Noble, Hugo Richards, Harrison Albright, and others—being case number 5484 in this court—wherein an action was brought by this plaintiff here to foreclose a mechanic's lien.

Mr. KIBBEY: We object to the judgment roll for the same reason that we demurred to the complaint. Probably this judgment roll supports their allegation that they had a judgment for $12,000.00 when the claim was $14,000.00.

The COURT: I overrule the objection. Let the judgment roll be marked in evidence, plaintiff's exhibit A.

(Thereupon the judgment roll in case number 5484 in this court is received in evidence and marked by the Clerk, plaintiff's exhibit A.)

Mr. ALEXANDER: I want to read a portion of this complaint. (To the jury.) Gentlemen, I will read you the complaint contained in this judgment roll number 5484 in this court.

The COURT: State the substance of it to them, Mr. Alexander.

Mr. ALEXANDER: This is a complaint to foreclose a mechanic's lien for labor and material furnished in the erection and construction of what is known as the Noble building in this city, and which claim of the lien desired to be foreclosed was for $14,306.00. This action, was brought by the plaintiff here in this action, Thomas Haverty Company, a corporation, against John Noble and Hugo Richards, H. Albright, Ryder, and others, and prays for the foreclosure of this lien in the sum of $14,306.00. This was filed in this court on the 9th day of March, 1908, and Alexander & Christy are attorneys for the plaintiff in that case. Then I desire to read to you the findings of fact and conclusions of law in that suit, in the same case, and rendered,—decided by this court—in substance finding that said lien was good and valid in the sum of $12,429.22; also finding that the defendant, Hugo Richards, in that case, at the time the mortgage which was executed by Noble to him on this building and upon which he sued and was made defendant in this action, was made by the Bank of Arizona the defendant in this case, and the notes and mortgage therein taken in the name of Hugo Richards for the use and benefit of the Bank of Arizona, the real party in interest; and then I read you the judgment on these find-

ings of fact and conclusions of law, that this plaintiff, Thomas Haverty Company, is adjudged and decreed to recover, and this lien was foreclosed for the sum of $12,429.22.

81 Mr. MORRISON: Mr. Alexander, you have the papers there, will you read that portion of the judgment about the liens and foreclosure—one paragraph there that tells all about the liens and mortgages and the priorities.

Mr. ALEXANDER: I will say to you this lien of $12,429.22 was declared by this court to be inferior to the judgment or mortgage lien of Hugo Richards.

Mr. MORRISON: The Bank of Arizona.

Mr. ALEXANDER: Yes sir, the Bank of Arizona, which was the real party in interest.

Mr. MORRISON: The Haverty lien was declared to be inferior and subject to the mortgage of the defendant in this case.

Mr. ALEXANDER: Yes, that is right. You admit here the proper capacity of both the plaintiff and defendant?

Mr. MORRISON: Yes sir.

Mr. ALEXANDER: No need to prove that, you admit it in your answer.

Mr. MORRISON: That is, that the plaintiff is a foreign corporation.

Mr. ALEXANDER: You admit it as alleged in the complaint.

82 Mr. MORRISON: Yes, on that subject.

Mr. ALEXANDER: The capacity of the defendant.

Mr. MORRISON: Yes, the Bank of Arizona is a corporation in this territory.

GEORGE D. CHRISTY, called as a witness in behalf of the plaintiff and duly sworn, testifies as follows:

Direct examination:

By Mr. FRANKLIN:

Q. What is your name?

A. George D. Christy.

Q. What is your business?

A. Attorney at law.

Q. Phœnix, Arizona?

A. At Phœnix, Arizona.

Q. Mr. Christy, you are acquainted with the plaintiff in this case, Thomas Haverty Company?

A. I am, yes.

Q. You are in partnership here with Mr. J. L. B. Alexander under the firm name and style of Alexander & Christy?

A. I am.

83 Q. How long have you been such?

A. I think since the first of January, 1908.

Q. Were you acquainted with the Thomas Haverty Company on or about the 28th day of February, 1908?

A. I was.

Q. Under what circumstances, Mr. Christy?

A. I had occasion for them to file a lien—mechanic's lien—

against the Noble building, the building being erected down here on Adams and First Streets at that time for John Noble.

Q. In what connection, what did you do?

A. In that connection I prepared the lien, the claim for lien, and sent it over to Haverty Company to be properly verified—their itemized account—and filed it in the county recorder's office as a mechanic's lien. Later, under instructions from Mr. Haverty, the president of the Thomas Haverty Company, I filed a suit in this court.

Mr. KIBBEY: That is all concluded by the judgment—it is irrelevant.

Mr. FRANKLIN: I want to show the circumstances in this connection.

The COURT: All that counsel is proving is the relation of the witness to the company.

Mr. FRANKLIN: I want to show about this agreement and claim.

84 Mr. KIBBEY: We object to it as incompetent, irrelevant and immaterial—testifying as to the contents of a written paper.

The COURT: There is nothing before the Court now.

The WITNESS: I filed suit in the district court to foreclose the lien.

By Mr. FRANKLIN:

Q. Then what was done—what did you do, Mr. Christy?

A. To that suit Hugo Richards was made a party defendant. He was represented in that suit by Messrs. Armstrong and Lewis, he claiming under a mortgage upon the building executed by John Noble. About October 16th, I think, Messrs. Armstrong & Lewis.

Q. What year?

A. 1908—served upon me a demand for a bill of particulars of each item put by the Thomas Haverty Company, and also the Foulkes-Gaylord people whom I also represented for lien—what each of those plaintiffs had put into the building. I sent to Mr. Haverty and the Foulkes-Gaylord people and got from each an itemized account of all the materials which they had put into the building.

Mr. MORRISON: Will you please speak up just a little louder, Mr. Christy?

85 The WITNESS: Certainly, I thought I was speaking loud enough to hear. After that, I presume it was about the middle of November—certainly not later than the 20th, 21st or 22nd—Mr. Lewis of the firm of Armstrong & Lewis, came over to my office in the Fleming Building and said that his people—I think he used the words "we"—we wish to close up these liens, and I said what are you going to do about mine. Well, he said, we will have to concede that the Foulkes-Gaylord lien is prior to our mortgage. We are going to take up all the liens, but we consider that the Thomas Haverty lien is subordinate to our mortgage. I told him that I thought there was a chance for a difference of opinion. He

said, yes, but that while we had a contract prior to their lien, we had not actually delivered any material under that contract upon the ground for the Fleming Building until after his mortgage.

By Mr. FRANKLIN:

Q. You mean the Noble Building?

A. Yes, the Noble Building. Well, we discussed what was the meaning of the word "furnished" under lien statute. He said this, we are willing to pay you——

Mr. KIBBEY: We object, unless authority is shown for Mr. Lewis or Mr. Armstrong, either one, to bind the defendant.

86 The COURT: I think the objection is well founded at the present time.

Mr. FRANKLIN: Of course the order of proof is, we realize, largely in the discretion of the Court, but we think under these circumstances, and we will avow now that we will connect this matter with the principal. But we wish to show this agreement, and I think that this is sometimes the only proper way to get it—by implied agency, or agency by estoppel—to proceed in this way: we show the agreement and what it is about and show what agreement was made—the conduct of the situation and surrounding circumstances—and then connect that with the principal to assume authority.

The COURT: Under the avowal of counsel, do you withdraw the objection?

Mr. KIBBEY: We think we insist upon our objection that they must show some agency. The mere fact that Armstrong & Lewis might be attorneys for Richards does not raise by implication power to make a contract for purchase.

The COURT: There is nothing to show that Armstrong & Lewis had anything to do with the matter any more than some one in Tucson.

Mr. FRANKLIN: Here is what Elliot has to say (Reading):

87 In all cases where the power of an agent to make a contract is questioned, the most convenient and natural course to pursue is to establish the fact that the agreement was made by showing its terms and the names of the parties who officiated in settling them; the next step to show is that those who assumed to act had the requisite authority.

The COURT: You haven't shown any agency of any kind—no connection between the parties at all. I sustain the objection to the question—there is no question, I think, but I sustain the objection to the witness testifying further to that at the present time.

By Mr. FRANKLIN:

Q. Mr. Christy, at that time what relation did Messrs. Armstrong & Lewis have to this matter?

Mr. KIBBEY: What matter?

Mr. FRANKLIN: The lien matter of Thomas Haverty Company and the liens and claims of liens against the Noble Building.

The WITNESS: As I have already stated, to that mechanic's lien action to foreclose the mechanic's lien of Thomas Haverty Company

and Foulkes-Gaylord, to which Hugo Richards was made a party, Armstrong & Lewis—Messrs. Armstrong & Lewis—appeared as attorneys for the defendant Hugo Richards in that action.

88 By Mr. FRANKLIN:

Q. What were their names?

A. Messrs. Armstrong & Lewis, a law firm composed of E. W. Lewis, now Judge of the Fifth District, and Thomas Armstrong, Jr., both attorneys of this bar at that time.

Q. Now, go ahead, Mr. Christy, and state—did you have any agreement with Messrs. Armstrong & Lewis, or either member of that firm?

A. At that particular time, no.

Mr. KIBBEY: We object to the question—well, you answer no, so go ahead.

The WITNESS: I had an offer or proposal from the firm.

By Mr. FRANKLIN: State under what circumstances the proposal was made to you.

A. As I before stated, Mr. E. W. Lewis, of the firm of Armstrong & Lewis, came to my office and said they were willing to pay for the Haverty lien—

Mr. MORRISON: We will object at this time, if the Court please, to any conversation such as indicated by the statement of the witness so far as he has gone, for the reason that there has been no evidence thus far even tending to show that Mr. Lewis, of the firm of Armstrong & Lewis, had any authority or right to com-
89 promise, or buy, or purchase this claim of lien or any judgment that might be recovered thereon.

The COURT: He is asked now whether he made any arrangement or had any offer of any kind by Mr. Lewis, who now is testified to as representing the concern. I think he is competent to testify as to what it was. He may answer.

The WITNESS (continuing): He said, we are willing to pay for just the materials and labor you have put in the building which we can use. He said you have a claim for lien there which comprises many items of tools, as to those you are not entitled to a lien, to which I agreed. He said further that his principals——

By Mr. FRANKLIN:

Q. Who did he mean by saying "we" and "you"?

A. When he said "we," I presumed he meant himself and his principals; when I said "we" I meant myself and my principals. He said we don't care to complete that building on the plans that Noble first had—it is too expensive. He said we have decided to cut down the plans, we cannot use and have no use for your boiler and heater. Well, I said, I will read your authorities and
90 see what I think about your lien—we still think our lien is good even though the material was not put upon the ground before the mortgage was recorded—we were manufacturing it for the purpose—and I had some authorities which I submitted to him. I was busy in court on some other matters, and a couple of days

later I had a phone from Mr. Lewis asking if I had read the authorities and had made up my mind. I had not. I either met him on the street or had a phone from him a second time, and told him I had read his authorities, and he said could I come over and see him and Mr. Armstrong, and I said yes and went over. Mr. Armstrong's office which he occupied with Mr. Lewis, was then in the Cotton Building, which is now being torn down where they are building the new National Bank of Arizona Building. Mr. Armstrong and Mr. Lewis were both in the office when I reached there. I went over with one copy of the bill of particulars furnished by Haverty under their notice, of which I had furnished Messrs. Armstrong and Lewis a copy. I think we discussed——

Mr. KIBBEY: His conversation with Armstrong & Lewis is not competent.

The COURT: Yes, there may be a question of the ratification of acts.

Mr. KIBBEY: Possibly with that end in view it may be competent.

91 The COURT: Proceed.

Mr. MORRISON: Our objection is that the only relationship thus far established is that of attorney and client, and that for that reason any conversation which relates to the promise of purchase of the lien or judgment is not included within the scope of the authority of an attorney at law acting as attorney for the party in a law suit pending.

The COURT: I overrule the objection.

Mr. FRANKLIN: Go ahead.

The WITNESS: We discussed his authorities and mine for perhaps half an hour, and discussed the effect of priorities, pro and con——

By Mr. FRANKLIN:

Q. When you speak of a bill of particulars what do you mean by that?

A. An itemized bill which at their request and notice was furnished to them, of each item of labor and material put by Thomas Haverty Company in the Noble building. We discussed them at least half an hour, I think, the relative legal points of priorities. They said, well, our mortgage is ahead of your lien—I said perhaps it is, your authorities would bear that construction as to the building and the lots, but we still would have a lien upon the stuff actually put in, and I can't say which of the two answered,

92 one of them said how much would it be worth if you took it out, and I said it would be worth virtually nothing, but we also, I said, have a right of appeal—we can carry this to the supreme court when there is a jurisdictional amount involved here—you want to close this building out and get it in shape to finish as speedily as possible: we want our rights. Well, they then said—I think it was Mr. Armstrong who said it this time—we can't use the heater, we can't use your boilers, they are too large, they don't fit with our modified plan; we won't pay you for the tools, for you haven't any right to a lien for them, which I admitted, but we will pay for the actual labor and material put in the building which we can use, and

no more. Thereupon we sat down at the table in the room—the north room of the three they had in the Cotton Building—Mr. Armstrong having one copy of this bill of particulars which we had furnished, and I having the other. We read over the items and checked them, and checked those to which he objected as either not having a lien for or that they could not use. Those items were checked off, and were three items on page four of this bill of particulars—one for two one hundred horse power, high pressure tubular boilers, appraised at $2,250.00; one item of freight on boilers, $865.52; one item of one No. 5 Connell patent heater, $650.00; and then a list of items on page five of the bill of particulars
93 covering one No. 90 pipe threading machine, $818.68; one No. 3 Vanderman pipe vise, $26.25; four No. 1 pipe vises, $11.25; two No. 2 pipe vises at $7.90, making $15.80; two No. 4 Stilson wrenches, $10.50; reading on to the last of the items of these latter items being for tools and machinery used by the Thomas Haverty people but not actually going into the construction of the building.

Q. What did that amount to?

A. Those items as checked out we then footed up and they amounted to $4,992.10.

Q. Then what did you do.

A. Which we then deducted from the total amount of the lien claimed by the Thomas Haverty people, which was $14,360.00, leaving a balance on deducting $4,992,10—it left a balance of $9,313.90. Then I said, now, your proposition is that you will pay us $9,313.90, and they said yes. Well, I said, how about those tools, have we the right to remove them, and Mr. Armstrong said yes, if they were there, there are a good many tools there that have been boxed, if they haven't been removed you can take all the tools you can find. Then I said how about the boiler and the heater, if you won't pay for them, how about them? He said, well, if they can be removed by Mr. Haverty without injuring the building, you can take them, but if taking them out—in taking them out—they would have to take out part of the side of the building or injure the building or the walls in any way, you can't have them. I said all
94 right. Now, about the assignment of the lien——

Q. Now, Mr. Christy, after checking the items off, you said the bill of particulars and claim of lien showed an aggregate amounting to $9,313.90. What was said about that amount?

A. That was the amount they would pay for as items and material actually gone into the building, and which they could use. That was as we arrived at it at that time. There is one modification which I will speak of later.

By Mr. MORRISON:

Q. About what date was this?

A. This conversation in Mr. Armstrong's office happened on the 30th day of November, 1908. Now, I said, how about this assignment of this claim, and Mr. Armstrong said we don't want an assignment of the claim, we want you to carry this suit of yours through to judgment and assign us the judgment. Well, I said,

how about these various items, and he said prove all you can, prove, anyhow, and assign us the judgment for all you can get, and stated the reason for it was because there were certain lease-holds on the building and other claims for lien which even though the Thomas Haverty lien might not be prior to the mortgage it was prior to these later lease-holds or later claims, and they wanted to cut them out. I said all right, this seems fair, but I have no authority to make a final settlement. I will submit the matter to Mr. Haverty. But Mr. Armstrong said when will you do it, we are very anxious to close out and settle these claims to know where we are at—to know whether we will go ahead with the work on the building. I said I will submit the proposition to him by tonight's mail, and he said what will you say to him, and I said I will write him a letter urging him as best I can to settle upon these terms proposed by you—I will write him by tonight's mail and urge that he accept your proposal. I left his office—the office of Armstrong & Lewis—walked over to my own office in the Fleming Building, and then five, or at most ten, minutes after leaving the offices of Armstrong & Lewis dictated to the stenographer in the office a letter to the Thomas Haverty people setting forth fully the terms——

Mr. MORRISON: We object to the contents of the letter being testified to by the witness.

The COURT: I sustain the objection.

By Mr. FRANKLIN:

Q. Did you submit that proposition to the Thomas Haverty people?

A. I submitted the proposition.

Q. As stated to you and given to you by Messrs. Armstrong & Lewis?

A. As stated and given to me.

Mr. MORRISON: We object: the letter would be the best evidence.

Mr. FRANKLIN: Then we will introduce the letter.

The COURT: I presume there is no question about the authority Haverty gave him?

Mr. KIBBEY: I think not.

Mr. FRANKLIN: We would like to introduce the letter.

Mr. KIBBEY: We object to the contents of the letter. This is only to prove the authority.

The COURT: You concede that Haverty gave authority to bring suit?

Mr. KIBBEY: Yes sir.

The COURT: Then you withdraw your objection to his stating that it was submitted?

Mr. MORRISON: We don't object to that; it was the contents of the letter.

The COURT: Mr. Morrison withdraws his objection.

The WITNESS: I submitted the proposition to Mr. Haverty on the night of November 30th, and on December 3rd, 1908, I received in return authorization from Mr. Haverty to close.

By Mr. FRANKLIN:

Q. Through what source?

A. Through the United States Mail—he simply saying we accept the proposition. Thereupon—whether it was—I won't say that it was on the third, though I think it was—either the third or fourth—either Friday or Saturday—in answer to a phone from Mr. Armstrong's office, Mr. Lewis talking asking if I had yet heard from Mr. Haverty, I replied that I had and that I would come over with his answer. I went over to the office. I think both Mr. Armstrong — Mr. Lewis were present. I told them that I had a letter from Mr. Haverty agreeing to their terms, and that we would close on that basis—that we would carry our lien to judgment and assign the same to them, they to prepare the form of assignment they desired and submit it to us, and we would have it properly executed. At that time Mr. Armstrong said to me——

By Mr. MORRISON:

Q. Was this by phone?

A. No, in the office in the Cotton Building. At that time
98 Mr. Armstrong said to me, we made a little mistake in figuring the other day, George, or Christy, I don't know which he called me—he said I see we omitted to check off one item, which was an item on page five, freight on pipe machine, $111.60.

Mr. MORRISON: Freight on what?

The WITNESS: On pipe machine. He said you having no lien for tools you should not have any lien for freight upon tools. To which I replied, Mr. Haverty will be over in a few days and I shall recommend to him that he cut that item out of your settlement, though I can't say whether he will until I hear from him or see him. It was either one or two days after that I received a phone from Mr. Armstrong, and I went over to Messrs. Armstrong & Lewis' Office in the Cotten Building. Mr. Armstrong said, I have received a letter from Mr. Hazeltine——

Mr. MORRISON: Before that, Mr. Christy—with reference to this conversation that you had with Messrs. Armstrong & Lewis, or either one of them, after getting the authorization from Mr. Haverty, when you told him that you would accept the proposition, what did he say?

The WITNESS: He said, all right, you carry it on to judgment and prove all that you can, and I said you are to prepare a form
99 of assignment and submit it to us and we will execute it.

Mr. MORRISON: Now go ahead.

The WITNESS: He said, I have just received a letter from Mr. Hazeltine; the letter which I wrote informing—I don't know whether he said the bank or Mr. Hazeltine or Mr. Wells—of Haverty's acceptance must have crossed in the mail with this letter from him to us. He had some letter in his hand, and he said, I fear I must have exceeded my authority in making that settlement—this letter says that Mr. Alexander has been up in Prescott going over this matter with the bank and he seems afraid of his case, and they instruct me that if I have not heard from Mr. Haverty on the set-

tlement to withdraw the offer. Now, that is as near—I think that is the substance of his words, and pretty nearly his exact words. He didn't read the letter to me, simply stated the contents to me, he having it in his hand. At that time I stated that I considered it a final settlement and expect you to live up to it. After that we carried the suit through. I spoke to Messrs. Armstrong & Lewis afterwards and told them we were ready to assign the judgment, but they said they had no authority to accept it, but they did prepare an assignment for the Foulkes-Gaylord judgment which they had also spoken of as I told you—sent the Foulkes-Gaylord judgment by mail
100 to me—by letter to me——

Mr. KIBBEY: I don't see the relevancy of this.

The WITNESS: —during the time I was at Globe, together with a draft in payment for the sum, which I forwarded on my return from Globe to the Foulkes-Gaylord people for them to execute the assignment, and then sent it together with the draft to Prescott where it was paid.

By Mr. FRANKLIN:

Q. Who drew that draft?
A. I don't know.

Mr. KIBBEY: We object—I don't see the relevancy of it at all.
The COURT: I sustain the objection.
Mr. FRANKLIN: If the Court pleases, in order to show——
The COURT: I will withdraw that ruling, for there is nothing for me to rule on—he has answered the question.
Mr. MORRISON: We objected to it—to the answer.
The COURT: His answer was that he didn't know. I don't see how it can hurt you any. His answer was that he didn't
101 know who drew the draft, and then Judge Kibbey objected.
Mr. MORRISON: When he started in to tell about the Foulkes-Gaylord judgment, we objected as not material.
The COURT: Judge Kibbey said he didn't see the relevancy of it; he didn't say whether he objected to it or not.
Mr. KIBBEY: We could not object to it until after he had said it, for it was not in response to any question.
The COURT: There was never any objection except to the question as to who drew the draft, and the witness said he didn't know.

By Mr. FRANKLIN:

Q. Now, Mr. Christy, did you have a conversation about this Thomas Haverty claim—the sale of it—with Messrs. Armstrong & Lewis, or either one, in the presence of Mr. Hazeltine?
A. Yes sir.
Q. Who is Mr. Hazeltine?
A. He is the cashier of the Bank of Arizona.
Q. The defendant in this suit?
A. The defendant in this cause.
Q. What took place there—who was present?

A. On the 14th day of December, the day before the trial
102 of the case of the Haverty Company and the Foulkes-Gaylord Company against Noble and Hugo Richards, I again——

By Mr. MORRISON:

Q. Who was present, and where?

A. I again was in the office of Armstrong & Lewis, and there was present Mr. Hazeltine and Mr. Armstrong and I think Mr. Lewis—also myself and Mr. Haverty. At that time Mr. Armstrong said I think you had better go on and try your case. I said, I expect to; we agreed to. He said, I think the settlement is off. I said at that time, and Mr. Hazeltine was sitting in the second, middle room of Mr. Armstrong & Lewis' office, over in the northwest corner—I said, we have made what we consider a binding contract and we expect you to live up to it.

By Mr. FRANKLIN:

Q. Did Mr. Hazeltine say anything?

A. Nothing was answered.

Q. Now, Mr. Christy, are you acquainted with a company by the name of Foulkes-Gaylord Company?

A. I am.

Q. On or about this time that you have been speaking about what was your relation to the Foulkes-Gaylord Company?

103 A. I was attorney for them.

Q. In what manner?

A. In the same matter—the Thomas Haverty Company and the Foulkes-Gaylord Company were joint plaintiffs in foreclosing liens upon the Noble Building—both plaintiffs in the same action—and I represented them both in that action with Mr. Alexander.

Q. Did you have any agreement, contract or arrangement with Messrs. Armstrong & Lewis, or either one of them, with reference to that?

A. We had a great deal of discussion on it. They said, we are going to take up your lien, we consider that we can't get away from the Foulkes-Gaylord lien, and that will be paid in full. I asked them at this meeting with Mr. Lewis whether they would take an assignment then, and he said, no you must go ahead and carry it to judgment, because there were certain leases on that building which they wished to cut out.

By Mr. MORRISON:

Q. Is this the Gaylord lien you are talking about?

A. Yes sir.

By Mr. FRANKLIN:

104 Q. Did you carry that Gaylord lien to judgment?

A. I carried that to judgment. I didn't issue execution upon it; I told them that if they would prepare an assignment of the judgment we would execute it. They did prepare an assignment of the judgment together with a draft for the amount—I think the

draft was signed by Armstrong & Lewis, but I don't remember, and it was drawn upon Harry Heep of Prescott. The letter from them said they are enclosing the draft and assignment of the judgment, and to forward the same to the Foulkes-Gaylord Company to be executed, and then have them send the executed——

By Mr. ALEXANDER:

Q. Have you that letter?
A. Yes sir.

By Mr. Franklin:

Q. Look at this and state to the jury if that is the letter you refer to. (Exhibiting letter to witness.)
A. That is the letter.
Q. From Messrs. Armstrong & Lewis to Messrs. Alexander & Christy?
A. Yes sir. Upon receipt of that letter I forwarded the assignment which was enclosed therein, and the draft, to the
105 Foulkes-Gaylord people at Los Angeles, where it was executed and forwarded to Prescott, and the draft paid.

Mr. FRANKLIN: Now, we want to introduce this letter from Armstrong & Lewis to Messrs. Alexander & Christy, as identified here, settling that Foulkes-Gaylord lien.
Mr. MORRISON: No objection.
The COURT: Mark it exhibit B.

(Thereupon the letter in question is received in evidence and marked by the Clerk, plaintiff's exhibit B.)

Mr. FRANKLIN: Now, Gentlemen of the Jury, this letter from Armstrong & Lewis to Alexander & Christy is as follows: (Reading.) February 13th, 1909. Messrs. Alexander & Christy, Phœnix, Arizona. Gentlemen: We are enclosing you herewith our draft on H. W. Heap of Prescott, Arizona, for $1,976.71-100 in favor of Foulkes-Gaylord Company to be used in taking up the judgment of Foulkes-Gaylord Company against John Noble et al. If you will kindly forward the assignment of judgment to which this draft is attached, to your clients, have them execute the same and send the papers, judgment and draft to Prescott, the draft will be immediately paid. Very truly, Armstrong & Lewis.

By Mr. FRANKLIN:

Q. Now, Mr. Christy, do you know of any other settlements
106 or propositions of settlement made by Messrs. Armstrong & Lewis with reference to the claims of lien and litigation with reference to the John Noble Building?
A. Only by hearsay.
Q. In your dealings and conversations and negotiations with Messrs. Armstrong & Lewis with reference to these matters, especially the Haverty matter and the Foulkes-Gaylord matter, whom did you understand that Messrs. Armstrong & Lewis were acting for and representing?

Mr. KIBBEY: We object to the question.

Mr. ALEXANDER: No, we are entitled to that. We may show on account of apparent authority evidence showing the understanding of the party dealing is admissible.

Mr. MORRISON: He may testify to the facts, but not his understanding—that is a conclusion of his mind—they didn't apparently have authority.

Mr. ALEXANDER: On account of apparent authority they were closing up deals here—the Foulkes-Gaylord matter.

The COURT: I think it is competent for the witness to state whom they were referring to, but it is not competent for him to state whom they were representing, concluding them by his understanding as to the agency—but I think it is perfectly proper for the wit-
107 ness to state whom in that conversation they referred to when they were talking about the matters.

Mr. KIBBEY: That he has stated directly.

By Mr. FRANKLIN:

Q. To whom did you understand they were referring to?

Mr. KIBBEY: We object to the form of the question again. The evidence is in now, if the Court please—he stated in the early part of his examination that they were talking about the bank and Richards when they said "we".

The COURT: You may ask directly whom they were referring to.

By Mr. FRANKLIN:

Q. Whom were they referring to?

A. I understand they were referring to the Bank of Arizona.

Q. Whom did you understand they were acting for?

Mr. KIBBEY: We object to the question.

Mr. ALEXANDER: We have the authority on this question of apparent authority. That is apparent authority, acting for the Bank of Arizona. This is the principle set down here in this authority on the question of apparent authority, being that the agent is admissible—dealing with the agent.

108 The COURT: I don't understand there is any question of that kind. Mr. Christy has said he was counsel in this law suit, and in this conversation he had with them they were speaking about these people, and in speaking about these people they offered certain negotiations, and so forth. I sustain the objection to the form of the question.

Mr. ALEXANDER: We except to the ruling of the court.

By Mr. FRANKLIN:

Q. Now, Mr. Christy, what did you do with reference—after this judgment was recovered, what did you do with reference to it after that—in the suit of the Thomas Haverty people against these people?

A. I suggested to Messrs. Armstrong & Lewis that we were ready and willing to assign the judgment if they would prepare the assignment.

Q. Well, what did they say about it?
A. I think they laughed.
Q. What else did you do about it?
A. I prepared a form of assignment and sent it over to Thomas Haverty Company to be executed.
Q. Look at that paper you have in your hand and tell me
109 what it is. (Handing paper to witness.)
A. That is an assignment of the Haverty judgment.
Q. That you have been talking about?
A. Yes.
Q. What did you do with it?
A. What did I do with it? After I received it properly executed I went to Prescott and went over to the Bank of Arizona and presented it to Mr. Hazeltine—tendered it to him.

By Mr. MORRISON:

Q. When was this?
A. The 18th day of March of this year—Yes, the 18th day of March of this year.

By Mr. FRANKLIN:

Q. Now, what did you do with it there?
A. I tendered him the judgment and demanded payment in the sum of $9,313.10.
Q. You mean the assignment of the judgment.
A. I tendered him the as-ignment of the judgment.
Q. To whom?
A. To Mr. Hazeltine of the bank.
110 Q. To whom is the assignment?
A. To the bank.
Q. You presented it to Mr. Hazeltine for whom?
A. For the Bank of Arizona.
Q. The defendant?
A. The defendant in this case.
Q. What did they do when you tendered it to them?
A. I said, Mr. Hazeltine—after talking about May wheat—I formally tender this assignment of judgment, and he said I as formally decline to receive it. I think those were the exact words.
Q. This is the one tendered to him? (Exhibiting paper.)
A. That is the one.

Mr. FRANKLIN: We offer this in evidence.
The COURT: Mark it exhibit C.
Mr. FRANKLIN: Gentlemen of the Jury, this is an assignment of the judgment that Thomas Haverty Company recovered in this suit they had against the John Noble Building in the foreclosure of this lien under our agreement as we contend we had with the Bank of Arizona to pay us $9,313.90 for it after we recovered judg-
111 ment in pursuance of that agreement. We tendered this and they refused to accept it, and now we offer it in evidence.
The COURT: Mark it exhibit C.

(Thereupon the assignment in question is received in evidence and marked by the Clerk, plaintiff's exhibit C.)

By Mr. ALEXANDER:

Q. Now, Mr. Christy, do you know of anything else that you think about in this case that we haven't asked you about, that you can tell the jury to enlighten them in this case?

A. All I could say would be to elaborate upon some conversations I have had. I have given the substance, I think, of all important parts of conversations.

Q. In reference to that letter, Mr. Christy, in which he said that he had received a letter from Mr. Hazeltine of the bank to withdraw that offer if not accepted. Did he show you that letter?

A. No. He had a paper, a letter, in his hand when I reached his office, and he said in substance as I have said. Whether he said withdraw the offer if you have not heard from Haverty, or whether he said withdraw the offer if Haverty has not accepted it, I am quite certain that that is the substance of it, and I think about the words.

112 Mr. ALEXANDER (addressing defendant's counsel): Gentlemen, have you that letter referred to by Mr. Christy in your possession?

Mr. KIBBEY: I don't think we are required to answer that question—we decline to answer it.

Mr. ALEXANDER: I am asking counsel now if they have that letter.

The COURT: Counsel decline to answer.

Mr. ALEXANDER: Then I ask counsel to produce that letter. Does counsel refuse to do that too?

Mr. KIBBEY: No, we shall not produce it.

Mr. ALEXANDER: All right.

The WITNESS: I want you to understand, Mr. Alexander, that what he read from the letter may not have been verbatim. I am telling you what he said was the contents of the letter. I never saw the letter myself. I am telling you what I understood his words to be.

By Mr. FRANKLIN:

Q. He was referring, when speaking, to a letter or paper or something that he had in his hands?

A. He said, I have received a letter from Mr. Hazeltine——

Q. Did he have anything in his hand?

113 A. He had a sheet of paper—I think it was a letter.

Mr. MORRISON: We object to his thoughts—ask to strike that out.

The COURT: Very well, strike out his thoughts.

By Mr. ALEXANDER:

Q. How about the paper he had in his hand—did it have the appearance of a letter?

A. It had been folded as if it came from an envelope.

Q. That is all you recollect about this? Oh, did you ever get the money?

A. No, the money has not been paid.

By Mr. FRANKLIN:

Q. Any part of it?
A. No part of it.

Mr. ALEXANDER: You may examine the witness.

The COURT: We will adjourn here. (To the jury.) Gentlemen, don't talk about this case, meanwhile, to anyone, or let anyone talk to you about it, or talk about it among yourselves, or form or express any opinion about it until finally submitted to you. Come back at two o'clock.

J. L. B. ALEXANDER, called as a witness in behalf of the
114 plaintiff and duly sworn, testifies as follows:

Direct examination.

By Mr. FRANKLIN:

Q. What is your name?
A. J. L. B. Alexander.
Q. What is your business, Mr. Alexander?
A. Attorney at law, Phœnix, Arizona.
Q. Are you in business with anybody else?
A. I belong to the firm of Alexander & Christy, composed of myself and George D. Christy.
Q. How long have you been in business as a lawyer?
A. Myself and Mr. Christy have been in business as a partnership since the first of January, 1908, and I have been practicing law many years prior thereto.
Q. You are acquainted with the plaintiff, Thomas Haverty Company?
A. I am.
Q. And the Bank of Arizona, the defendant?
A. I am.

Q. Your firm were attorneys for the Thomas Haverty
115 Company in the foreclosure of a lien in the collection of a claim against the Noble Building here in Phœnix, Arizona?
A. We were.
Q. In the course of that litigation, Mr. Alexander, did you have occasion to visit Prescott, Arizona?
A. I did in December, 1908.
Q. When was that?
A. I left here the first day of December and reached there the same day in the afternoon.
Q. You went to Prescott?
A. Yes sir.
Q. While in Prescott did you have occasion to have any conversations with the Bank of Arizona with reference to this claim of Thomas Haverty Company against the John Noble property?
A. I did. I had a conversation with Mr. Hazeltine, cashier of the bank, and also with E. W. Wells, vice president of that bank, on the third day of December, 1908.

Q. Did you see Hugo Richards?
A. I saw him on that day. I saw him previous to seeing Mr. Hazeltine and Judge Wells.
116 Q. Who is Mr. Hazeltine?
A. He is cashier of the Bank of Arizona of Prescott.
Q. What was the occasion of your going to Mr. Hazeltine?
A. I went from here on December first to defend some Apache Indians charged with murder in Yavapai County, and while there I called upon Hugo Richards and also on Mr. Hazeltine.
Q. What did you call on Hugo Richards for?

Mr. MORRISON: We object to the question as immaterial.
The COURT: He may answer.

The WITNESS: I called on Hugo Richards for this reason: Prior to leaving here for Prescott, on the 30th of November, a proposition had been made by Messrs. Armstrong & Lewis, attorneys for Hugo Richards, in this city, in this foreclosure of mechanic's lien by Haverty Company, in which Christy and myself were attorneys for Haverty—a proposition to compromise and pay a certain amount of money for the claim.

By Mr. FRANKLIN:

117 Q. The suit you refer to is the one in which the judgment has been introduced in evidence in this case?
A. Yes, the judgment roll.
Q. Go ahead.

The COURT: Let me understand: Neither the Bank nor Mr. Richards were parties to that suit?
The WITNESS: Richards was a party to the suit.
The COURT: Very well, go ahead.
The WITNESS: The offer had been made the day before I left for Prescott, and the offer was $9,313.90—something like that—and on that day Mr. Christy and I had recommended to Haverty to accept the offer, and in making this offer certain items which Haverty claimed a lien for had been excluded from the claim—the claim was originally fourteen thousand and some odd dollars—among them two boilers and a heating apparatus. We would like to have that included, and Mr. Armstrong said he could not use it.

By Mr. MORRISON:

Q. Did you hear what Mr. Armstrong said?
A. No, Christy repeated that to me.

Mr. MORRISON: We object to it and ask to have it stricken out.

118 The COURT: Strike it out.

The WITNESS: I understood that to be the fact. When I got to Prescott to attend to this United States business, on December 3rd in the forenoon, I went to the Bank of Arizona.

By Mr. FRANKLIN:

Q. Whom did you first meet?

A. When I went in there Hugo Richards was in the office and I went over to him and I said to him that we have had a talk with Mr. Armstrong and Lewis and they had made an offer to compromise the Haverty claim, but that he had excluded certain material, boilers and heating apparatus, and I wanted to see if he wouldn't take them as well. Richards said this is a bank matter I have nothing to do with it, see Hazeltine, he has it in charge.

Q. Then what did you do?

A. I went from the east end of the bank to the west end of the bank to Hazeltine's stall in the bank. I met Mr. Hazeltine and I said I just came to see Mr. Richards here in reference to the Haverty claim, and he tells me to come to see you, that you are in charge of it, that it is a bank matter. He said all right, come in. Judge Wells was standing at a little desk on the west side of the bank writing something, and Hazeltine said there is Judge Wells, let him come in too. I said yes, and he opened the door going into the
119 extreme west little room of the bank and Judge Wells and Hazeltine went in there, and I said to Hazeltine and Judge Wells that Armstrong & Lewis had made an offer to settle the Haverty claim and had offered $9,313.00. I had a sheet of paper which showed the exact amount offered and what had been deducted—I showed him that. He said, well, if he has offered you that you had better take it. I said, I know that: we have submitted that to Mr. Haverty for acceptance, but that isn't it; what I want to see you about is whether you will not take in addition the boilers and heating apparatus. They are in the building: you certainly will need them. They are in the building and hard to get out. You have to have a heating plant to heat the building and you will need them. Judge Wells said we have modified the plans of this building, and it is too expensive, and we will not need them. We have provided other methods of heating the building. Well, I said, now I think that Colonel Randolph of Tucson has been thinking something of coming to Phœnix and bring his headquarters there, and the only reason he has not come, as he said to me, was because he had no building to accommodate his force—now I believe that if this building was completed that Colonel Randolph could probably be induced to take the building. Judge Wells said, if you can get Colonel Randolph to take the building, we will take the
120 boilers and heating apparatus and pay Haverty for them, and we will compensate you well. I said I don't know that I can do it, but I will try it. That was about the substance of the conversation we had there. I went out and went to the telephone office and phoned Christy that I had seen Mr. Hazeltine——

Mr. MORRISON: We object to the witness stating the conversation that he had with Mr. Christy over the telephone.

The COURT: Yes.

The WITNESS: I phoned the result of the conversation with Mr.

Hazeltine and Judge Wells, and said that I could not be home before Sunday or Monday.

By Mr. FRANKLIN:

Q. When did this occur?

A. December 3rd, 1908, because on the next day, the 4th, I tried the murder case for which Mr. Morrison was prosecuting attorney, and on that afternoon there was a verdict of acquittal and I left that evening for home, and brought the Apache Indians here and sent them to the Tonto Basin where they live.

Q. At the time you left Phœnix your firm had no authority to accept the offer made by Armstrong & Lewis to pay you $9,313.90?

121 A. No. We submitted that to the Haverty Company in Los Angeles—we wrote to them that same evening, and I left the next morning and went to Prescott on the first.

Q. You say that you stated to Mr. Hazeltine the offer that had been made to you by Messrs. Armstrong & Lewis.

A. I did. I had a sheet of paper on which the figures were down, and I gave it to Mr. Hazeltine, and he took a copy of it.

Q. Did you give them a bill of particulars, or itemized statement of that?

A I had a pad which I took from here with me which showed the amount claimed by Haverty and the amount deducted by Armstrong & Lewis for the boilers and heater and tools, leaving the balance $9,313 and some odd cents. I gave that and showed it to Hazeltine and he put it down on a pad.

Q. Did you have any discussion with Mr. Hazeltine or Judge Wells at that time with reference to any priority of liens?

A. Oh, yes, we discussed that, Judge Wells and I. He said he had counsel in Phœnix, Messrs. Armstrong & Lewis, and he guessed they were able to attend to the matter. He was not attending to the law portion of it.

122 Q. Well, with reference to the offer that Messrs. Armstrong & Lewis had made to your firm as agents of the Haverty Company, what did he say about that—the offer that they had made?

A. He said, when I first told him of the offer, he said you better take it if he offered you that, and I said I know it, we submitted the proposition, but that is not the proposition I want to talk about—I want you to take in addition the boilers and heating apparatus, you will need them in your building.

Q. Anything else, Mr. Alexander?

A. No. Oh, we had quite a conversation with Mr. Hazeltine and Mr. Wells—the prosperity of Phœnix and how things were rapidly growing here and the increase of population—what a fine town Phœnix was going to be in the future. We talked of many matters. I have known Mr. Hazeltine many years, and also Judge Wells twenty-seven years—relations have always been friendly. In fact, I represent them in a case here.

Mr. FRANKLIN: I believe that is all.

The WITNESS: I must admit that I expressed some doubt to Mr. Wells and Mr. Hazeltine as to whether Haverty did have a prior lien.

Cross-examination.

By Mr. MORRISON:

123 Q. As I understand it, this conversation was the third of December, in Prescott, in the building of the Bank of Arizona?

A. Yes sir.

Q. And in the presence of Judge Wells and Mr. Hazeltine?

A. Yes sir, I talked with both of them.

Q. And they were both present there during all this conversation?

A. All the time until I left the place.

Q. Now, which one was it that you stated said if Armstrong & Lewis have made that kind of an offer you better accept it?

A. Mr. Hazeltine.

Q. Mr. Hazeltine?

A. Yes sir.

Q. Well, was your object in having this conversation to effect a change of any suggestion that may have been made by Armstrong & Lewis?

A. None at all. All my endeavor was while I went to that trial, as I said to Mr. Christy beforehand, I could probably see Judge Wells, a friend of mine, and he would probably take those boilers. Just to get him to take the boilers in addition to what they made the offer for—and the heating apparatus.

124 Q. Then you, representing your firm, had passed by Armstrong & Lewis and gone to their clients, is that it?

A. Yes sir, Armstrong & Lewis said they would not take it, and I said I thought I could prevail on Judge Wells and Mr. Hazeltine to take them at a cost which would be agreeable to them. In fact I said we will give them to you at cost—just what it cost them.

Q You were not successful in that?

A. No sir, they said they had modified the plans of the building and had no use for them, but if you can get Randolph to come in we will take them.

Q. All that occurred between you and Mr. Richards was that he referred you to Mr. Hazeltine—it was a bank matter?

A. Yes sir, he said Hazeltine has the matter in charge, you talk to him.

Q. That was all?

A. That was all.

Mr. MORRISON: That is all.

(Witness excused.)

THOMAS ARMSTRONG, Jr., called as a witness in behalf of the plaintiff and duly sworn, testifies as follows:

125 Direct examination.

By Mr. ALEXANDER:

Q. What is your name?
A. Thomas Armstrong, Jr.
Q. You are a practicing attorney in Phœnix?
A. Yes sir.
Q. And you have been for many years past?
A. Yes sir.
Q. Now, during the year 1908 and up to the time — you were connected with Judge Lewis—E. W. Lewis, were you?
A. Yes sir.
Q. Known as the firm of Armstrong & Lewis?
A. Yes sir.
Q. And up to the time he was appointed on the bench?
A. Yes sir.
Q. Some time in 1909?
A. That is my recollection, yes sir.
Q. Now, while you and Lewis were partners under the firm name of Armstrong & Lewis, you were the attorney of Hugo Rich-
126 ards, one of the defendants in this particular action in which the judgment roll has been offered in evidence, and introduced in evidence, in case No. 5484?
A. Yes sir, if that is the case of Foulkes-Gaylord against Hugo Richards.
Q. Yes sir, for the foreclosure of some liens on the Noble Building?
A. Yes sir.
Q. You represented them in all that litigation?
A. I represented, or Mr. Lewis and I, the Bank of Arizona.
Q. Up to the time that this judgment was obtained in this case?
A. Yes, and until the judgment had passed into a sale and the property had been sold.
Q. You were representing the Bank of Arizona?
A. As attorneys, yes sir.
Q. The defendant here?
A. As attorneys in that suit.
Q. Now, Mr. Armstrong, you know Mr. W. E. Hazeltine?
A. His name is not W. A.; I think it is M. B.
127 Q. M. B., yes. His name is Moses B. Hazeltine?
A. Yes sir.
Q. Do you recollect, Mr. Armstrong, of having some correspondence with Mr. Hazeltine as cashier of the Bank of Arizona between the 3rd day of December and the 6th day of December, 1908?

Mr. KIBBEY: We object to the question.
The COURT: He may answer.

By Mr. ALEXANDER:

Q. Do you recollect that?

A. Yes sir.

Q. Do you recollect having written a letter about December 5th or 6th?

Mr. KIBBEY: We object to the question on the ground that it is a privileged correspondence conducted between attorney and client.

Mr. ALEXANDER: I am just asking if he did.

The COURT: He may answer.

Mr. ALEXANDER: Please read the last question, Mr. Reporter.

(Thereupon the reporter reads the following question: Q. Do you recollect having written a letter about December 5th or 6th?)

The WITNESS: Yes sir.

By Mr. ALEXANDER:

128 Q. You recollect having written them a letter between those dates?

Mr. KIBBEY: We renew our objection to the question.

The COURT: Same ruling.

The WITNESS: Yes sir.

By Mr. ALEXANDER:

Q. And in reference to this matter of this litigation, or this matter of the Haverty lien?

Mr. KIBBEY: We object to the question for the same reason stated before.

The COURT: He may answer. I overrule the objection.

The WITNESS: Yes sir.

By Mr. ALEXANDER:

Q. Do you recollect having received a letter from him after you wrote him about it?

Mr. KIBBEY: We object to the question for the same reason as stated before—going into communications that are privileged.

The WITNESS: Yes sir.

By Mr. ALEXANDER:

Q. That was between the third and fifth or sixth and seventh?

129 Mr. KIBBEY: We object to the question for the same reason.

The COURT: I overrule the objection.

The WITNESS: It was along about the fourth or fifth, my recollection is.

By Mr. ALEXANDER:

Q. That was also in reference to the same subject matter?

Mr. KIBBEY: We object to the question for the same reason—

he is calling now for a privileged communication between attorney and client.

The COURT: I overrule the objection.

Mr. KIBBEY: To these rulings of the court we desire to note exceptions.

The COURT: Yes. He may answer.

The WITNESS: Yes sir.

By Mr. ALEXANDER:

Q. Have you that letter that he wrote you?

Mr. KIBBEY: Same objection.

The COURT: Same ruling.

The WITNESS: Mr. Morrison has it, I think.

By Mr. ALEXANDER:

Q. You turned it over to him?

A. Yes sir.

130 Q. A subpœna duces tecum was served upon you within the last ten days or two weeks to produce this correspondence here.

A. A subpœna was served upon me to produce all the letters that ever passed between the Bank of Arizona and Hugo Richards and Judge Wells and Mr. Hazeltine and myself for the firm of Armstrong and Lewis between certain dates, I think the 30th of October and the 30th of December, something like that.

Q. It was served on you, was it not?

A. A subpœna of that sort was served on me—it had no reference to anything in this case.

Q. You knew what we wanted.

A. I didn't know anything more what it meant than what it said.

Q. What is that?

A. I knew nothing more about what it meant than what it said.

Q. You had a pretty good idea what was wanted, didn't you?

Mr. MORRISON: We object to the question.

The COURT: I sustain the objection.

By Mr. ALEXANDER:

Q. Why didn't you produce that letter here? Why did you give it to Mr. Morrison?

130½ Mr. MORRISON: We object to the question on the ground that it is incompetent, irrelevant and immaterial.

The COURT: It is here in court.

Mr. ALEXANDER: I ask that that letter be produced now.

Mr. MORRISON: At this time we decline to produce it.

Mr. ALEXANDER: What is your reason for refusing?

Mr. MORRISON: We object to the production of this letter in any

way, or these letters, because of the fact that they are privileged communications passing between client and attorney.

The COURT (to the jury): Gentlemen, you may retire for a few minutes into the jury room where I can reach you, and in the meantime don't talk about the case among yourselves or with anyone else or form or express an opinion about it until finally submitted to you.

(Thereupon the jury retire from the court room and are absent during the succeeding argument and examination of the witness.)

The COURT: Now, what letter is it?

Mr. ALEXANDER: I want this letter that counsel said he
131 got from the Bank of Arizona to which Mr. Christy referred that he heard read to him, or the contents stated to him.

Mr. KIBBEY: He didn't testify to that.

The COURT: Let me see the letter. It may be that the letter will be sufficient—if it brings up any question of law I will hear you.

Mr. MORRISON: Which letter is it that you want, gentlemen?

The COURT: The letter from the Bank of Arizona to Armstrong & Lewis. (Defendant's counsel hands letter to the court.) You never have seen this letter, Mr. Alexander?

Mr. ALEXANDER: No sir.

Mr. KIBBEY: We don't think he has a right to see it.

The COURT: I understand. I suppose the situation is this: Of course if Messrs. Armstrong & Lewis were acting as legal advisers of the bank in this matter, a matter in which they had been retained, any communication between them were privileged; if they were acting as their counsel in a matter of this kind and authorized to act I presume they were acting within the scope of their authority and the bank would be bound; if they were not acting within the scope of their authority, then the communication could not be produced for then it could not be a communication made to them in the course of employment for which they were retained—
132 if it is outside matter for which they had no authority to act, then it is not a privileged communication; if it is a matter in which they were authorized to act then the matter would be privileged. On the other hand, if that were so, I presume the bank would be bound by the act of their lawyers. I don't see that this letter has anything to do with it.

Mr. KIBBEY: It don't make any difference, for the relations of attorney and client exist relating to that business even if they are authorized to purchase or compromise the claim, for anything of that kind would be privileged. The Court can't say we were acting simply as agent to procure a compromise of the claim and not acting in this particular instance as attorney, for then we could never arrive at a determination of the matter. Here are attorneys at law engaged to prosecute a law suit in which this identical matter comes up. Now if the attorneys have a right to purchase an adverse claim pending litigation by reason of their relations as attorney and client, then of course the client is bound; if they haven't that right unless particularly authorized, if they are particularly au-

thorized, they are authorized as attorneys—it doesn't change the confidential relation.

The COURT: Not as attorney, however, but as agent to pur-
133 chase.

Mr. KIBBEY: It doesn't make any difference, you can't change the character of the confidential relation when treating of the same subject matter. To say that you are an attorney as long as you are simply fighting this law suit, but as long as I authorize you to compromise you are simply my agent—it is a distinction that can't be made. Suppose the question of compromise is made and you consult the attorney about it, the powers of compromise not being within the scope of attorney at law—a question of whether you shall compromise or not—is not that just as much privileged as matter connected with the prosecution of that matter or its defense?

The COURT: That is something within the attorney's authority.

Mr. KIBBEY: Suppose during the adjustment of a claim, the attorney, not having the right to adjust it or purchase it, that there are communications passing between the attorney and the client—you may purchase that claim in order to settle, can it be possible that up to the very point of the question of authority to settle the claim they are attorney and client and therefore the communication is privileged, but whenever they pass that point they become merely principal and agent and the ordinary rules are applied? We don't think that is the authority, and it would be utterly impracticable.

134 (Thereupon comes the further argument of counsel on the question of the admission of the letter, pro and con, which argument is not taken down by the reporter.)

The COURT: I am inclined to think that the communication is privileged. I don't see just how we are going to treat it in the record. You have an objection to the introduction of the letter which I have sustained, but they are entitled to have it get in the record so that if an appeal should be taken the Supreme Court would have the letter before them.

Mr. KIBBEY: I think they have a right to have the letter in the record some way so that the Supreme Court may have the contents before them if the case is taken up.

The COURT: I think the letter should be marked as tendered, and that the Court refused to permit it to be admitted, and then let it be marked exhibit D for identification, or something of that sort, so that it may be in the record in case of appeal. And for that reason I don't see any reason why counsel should not have an opportunity to see it now.

Mr. KIBBEY: I don't see any objection to that.

The COURT: The letter may be marked exhibit D for identification, being a letter offered by the plaintiff in evidence and
135 objected to by the defendant and the objection of the defendant sustained and the document excluded.

Mr. ALEXANDER: We take an exception to the ruling of the court excluding the letter. Mr. Armstrong will take the stand.

(Thereupon the letter in question is marked plaintiff's exhibit D for identification, by the Clerk.)

Mr. ALEXANDER: We have not seen this letter——

Mr. KIBBEY: We think we have an objection to counsel seeing the communication.

The COURT: How can we get it before the Supreme Court?

Mr. KIBBEY: All the Court has to do is to say that it is a privileged communication.

Mr. ALEXANDER: We have a right to predicate an assignment of error on it.

Mr. KIBBEY: We think that when the Court determines that it is a privileged communication, that settles it.

The COURT: You may ask the other questions in relation to the other letter in the absence of the jury.

(Thereupon the witness, Thos. Armstrong, Jr., who has
136 temporarily left the witness stand during the argument of counsel, again takes the stand and is examined further during the absence of the jury.)

By Mr. ALEXANDER:

Q. Mr. Armstrong, have you a copy of a letter which you wrote to Mr. Hazeltine of the Bank of Arizona between the third and fifth day of December, 1908, relative to the offer made to Mr. Christy to buy this claim?

A. I never made any unqualified offer to Mr. Christy.

Mr. MORRISON: We object to the question——

By Mr. ALEXANDER:

Q. Have you that letter with you?

Mr. MORRISON: One moment. We object to the question because it relates to a privileged communication passing between Mr. Armstrong and the bank, his client.

The COURT: I think that I shall have to rule that that is so with respect to anything they may have written their client about the purchase of the claim on the view I take of the law that it will be a privileged communication.

Mr. ALEXANDER: If this letter should contain a statement to their client that they offered Christy so much for the Haverty claim, would that be confidention?

137 The COURT: I am inclined to think that it would.

Mr. ALEXANDER: That would be confidention?

The COURT: I am going to so hold—part of the advice between them. I will therefore exclude the letter if the letter should contain a statement that they had made an offer to the Haverty Company. That will be sufficient on the record.

Mr. ALEXANDER: We propose to prove, then, by this witness that he wrote to either the Bank of Arizona or Hazeltine, the cashier, after a conversation that he had with Mr. Christy, as he related it here on direct examination, relative to the offer alleged by Mr.

Christy as made by Armstrong and Lewis to purchase the claim of the Haverty Company for $9,313.90; that he wrote a letter immediately after this offer was accepted by the Haverty Company through Christy; that he wrote a letter to the Bank of Arizona or Hazeltine advising him of the fact that he had made the offer and that it had been accepted.

Mr. KIBBEY: We object to counsel making any statement in the record of what he wants to prove by this witness——

The COURT: Do I understand that the client seeks his
138 privilege?

Mr. MORRISON: Yes sir.

The COURT: Therefore, on the ground that the client objects, it being a privileged communication, I sustain it on the ground that it is a privileged communication, and cannot be received in evidence. Of course the witness could not refuse to answer on that ground.

Mr. ALEXANDER: We take an exception to the ruling of the Court.

The COURT: Let the jury come in.

(Thereupon the jurors come back into Court and are called by the Clerk, all answering to their names.)

By Mr. ALEXANDER:

Q. Mr. Armstrong, you heard Mr. Christy testify here this morning?

A. Yes sir.

Q. Now, you heard him testify to the fact that he had had a conversation with you and Mr. Lewis, your partner, relative to the procuring by the Bank of Arizona of the claim of the Haverty Company?

A. Yes sir.

Q. Did you after that at any time communicate to the Bank of Arizona or to M. B. Hazeltine, the cashier, that conversation, and the arrangement you had, if any, with Mr. Christy?

139 Mr. MORRISON: We object to the question on the ground that it is calling for a privileged communication between attorney and client.

The COURT: The client desires to avail himself of the privilege; I sustain it on that ground.

By Mr. FRANKLIN:

Q. Do you claim the privilege as attorney at law?

The COURT: He has no right to.

Mr. FRANKLIN: Who claims it?

Mr. MORRISON: The client—the defendant here.

Mr. FRANKLIN: We except to the ruling of the court.

The COURT: Is there anything further?

Mr. ALEXANDER: No.

The COURT: Any cross examination?

Mr. MORRISON: No.

(Witness excused.)

The COURT: Call your next witness.

THOMAS HAVERTY, called as a witness in behalf of the plaintiff and duly sworn, testified as follows:

Direct examination.

By Mr. ALEXANDER:

Q. What is your name?

140 A. Thomas Haverty.

Q. Are you the—what connection have you with this plaintiff, the Thomas Haverty Company?

A. I am president of the company.

Q. You organized it yourself—you are engaged in what business?

A. Plumbing and heating contractors.

Q. Do you know this Noble Building in Phœnix on First and Adams streets?

A. I do.

Q. This plaintiff is the same Thomas Haverty Company you have spoken of?

A. Yes sir.

Q. Do you recollect furnishing material and labor for the construction of that building?

A. I do.

Mr. MORRISON: We object; this is all concluded by the judgment.

By Mr. ALEXANDER:

Q. Have you ever been paid for it?

A. No sir.

Mr. MORRISON: We object.

141 The COURT: He has a right to find out whether he was paid the nine thousand odd dollars.

Mr. MORRISON: He passes on to the next question before we get through with this one.

By Mr. ALEXANDER:

Q. Have you ever been paid the $9,313.90 or any part thereof by anyone?

A. Not a cent.

Q. For the judgment you got on it?

A. Not a cent.

Q. You know Mr. Hazeltine, the cashier of this defendant company?

A. Yes sir.

Q. And you know Mr. Thomas Armstrong, his attorney?

A. Yes sir.

Q. And Mr. Lewis?

A. Yes sir, I have met them.

Q. And you recollect of being—— You know where Mr. Armstrong's office was about two years ago in December, 1908?
A. Yes sir.
Q. Were you ever there at that office with Mr. Christy?
142 A. Yes sir.
Q. When was that?
A. I believe it was a day or two before the last trial—before our trial.
Q. Who was present then?
A. Mr. Armstrong, Mr. Lewis, Mr. Christy and myself, and I think there was one or two of the other contractors on the building.
Q. Did you ever see Mr. Hazeltine there?
A. I believe he was there.

Mr. ALEXANDER: That is all.

Cross examination.

By Mr. MORRISON:

Q. What date was that?
A. I couldn't tell you—just before we had the trial of our lien suit.
Q. A day or two before?
A. About that time—it may have been the same morning that the case was called in the court here.
Q. Mr. Haverty, you say you know Mr. Hazeltine?
A. I have met the gentleman several times, yes sir.
143 Q. The occurrence you have been asked to testify to about a day or two before this trial was the one that Captain Christy testified to this morning?
A. I beg pardon?
Q. The incident that your attention is directed to—the meeting of the parties in Armstrong & Lewis' office, where you say you were present, is the same incident and occurrence that Captain Christy testified to this morning?

Mr. ALEXANDER: We object to the question. Captain Christy testified to several—which one do you mean?
Mr. MORRISON: The one a day or two before the trial.
The COURT: That is the only one that he testified to in reference to Mr. Haverty being there.
The WITNESS: Yes sir, that is the one.

By Mr. MORRISON:

Q. That is the one that you had reference to?
A. Yes sir.
Q. Do you remember seeing Mr. Hazeltine there?
A. I am quite sure he was there. He was a stranger and
144 I would not remember him as well as I do now.
Q. You know him now?
A. Yes sir.

Q. This was the gentleman here now? (Indicating Mr. Hazeltine.)

A. I believe so, as far as my memory would serve me.

Q. He was in the room where this conversation occurred?

A. I believe he was.

Mr. MORRISON: That is all.

(Witness excused.)

Mr. ALEXANDER: That is the case for the plaintiff.

Mr. MORRISON: If the Court please, we have a motion to make and ask that the jury be excluded.

The COURT: (To the jury.) Gentlemen, will you retire again for a few minutes into the jury room, and meanwhile bear in mind what I have said about not talking about the case among yourselves or with anyone else, and do not form or express any opinion about it until finally submitted to you.

(Thereupon the jurors retire to the jury room and are
145 absent during the argument of the motion.)

Mr. MORRISON: Now we move the Court to direct a verdict in behalf of the defendant in this case because of the failure of proof on the part of the plaintiff to establish any contract that was completed and closed up as between the plaintiff and the defendant. Mr. Christy—Captain Christy—testified that in the last conversation he had with Messrs. Armstrong and Lewis in reference to the closing up of this matter and the settlement of this controversy, that upon his coming into the office—Mr. Christy coming into the office of Armstrong and Lewis, Mr. Armstrong said there has been a mistake in the figures here, and thereupon Mr. Christy said that Mr. Armstrong directed his attention to an item of $110.00 or $111.00 that should be deducted and cut out, and Captain Christy said I have no authority whatever to settle that proposition, I will submit it, and at this time I cannot say whether it shall be cut out or not, and there the matter rested.

The COURT: I thought that was after he had notified them that it had been accepted.

Mr. MORRISON: No, at the very time he went in there and they were having the conversation, he said that he was not in position to accept it at that time—his own language—I have no authority whatever at this time to say whether that item shall be cut out or
146 not. Therefore the amount was undetermined and left unsettled, and the controversy in dispute was not settled, and there was no meeting of the minds of the parties, and the next day comes the notification, we have decided to withdraw the compromise or the offer of settlement—no delay, except about twenty-four hours.

The COURT: Do I understand that that was before they notified them that they accepted the offer, of this other amount?

Mr. MORRISON: That was the same conversation.

The COURT: (To the reporter.) Read that part of Mr. Christy's testimony that covers this particular point.

(Thereupon the reporter reads the following portion of the testimony of the witness Christy: "In answer to a phone from Mr. Armstrong's office, Mr. Lewis talking, asking if I had yet heard from Mr. Haverty, I replied that I had and that I would come over with his answer. I went over to the office. I think both Mr. Armstrong and Mr. Lewis were present. I told them that I had a letter from Mr. Haverty agreeing to their terms, and that we would close on that basis—that we would carry our lien to judgment and assign the same to them, they to prepare the form of assignment they desired and submit it to us and we would have it properly executed.

147 At that time Mr. Armstrong said to me * * * By Mr. Morrison: Q. Was this by phone? A. No, in the office of the Cotton Building. At that time Mr. Armstrong said to me, we made a little mistake in figuring the other day, George, or Christy, I don't know which he called me—he said I see we omitted to check off one item, which was an item on page five, freight on pipe machine, $111.60. Mr. Morrison: Freight on what? The witness: On pipe machine. He said you have no lien for tools, you should not have any lien for freight upon tools. To which I replied, Mr. Haverty will be over in a few days and I shall recommend to him that he cut that item out of your settlement, though I can't say whether he will until I hear from him or see him. It was either one or two days after that I received a phone from Mr. Armstrong * * *)—(Page 42.)

The COURT: That will do. I don't think as a matter of law that I can say whether or not the contract was completed. I think it is for the jury to determine. I don't know myself. The apparent inference to me is that they agreed on this, and then Mr. Armstrong said there is a one hundred dollar item that was overlooked, and Mr. Christy said we will try and get them to cut that out too. At any event I don't think I can say as a matter of law that the contract was settled or not.

Mr. KIBBEY: As a matter of fact it was not settled.

148 The COURT: I deny the motion.

Mr. KIBBEY: We want to make a further motion. There has been no sufficient proof of authority for the attorneys to make a settlement of the claim.

The COURT: As I understand the rule to be on a question of authority of an agent, where there is no evidence of authority at all, it becomes a matter for the Court to determine—where there is any evidence it is for the jury to say whether or not the agency exists from a sufficiency of the evidence. I understand that there is testimony here of this offer made by Mr. Armstrong—some testimony of some one of these gentlemen of the bank being present when something was said about it in Mr. Armstrong's office, and evidence of something being said about it in Prescott, to show they had some knowledge about it. I think there is enough to go to the jury on.

Mr. MORRISON: So far as the presence of one member of the bank in Mr. Armstrong's office, that was long after the time the proposition had been abrogated, as we claim—a day or two before the trial.

The COURT: It bears on the subject only so far as it might indicate from the conversation then had that the officers of the bank did know previously of it. I think there is sufficient evidence for it to go to the jury. Call the jury in.

149 (Thereupon the jurors return into Court and are called by the Clerk, all answering to their names.)

The COURT: Proceed.

E. W. LEWIS, called as a witness in behalf of the defendant and being duly sworn, testifies as follows:

Direct examination.

By Mr. MORRISON:

Q. What is your name?
A. Ernest W. Lewis.
Q. What official position, if any, do you occupy at present?
A. I am Associate Justice of the Supreme Court of Arizona.
Q. Your district is where?
A. The fifth judicial district.
Q. And the seat of that district is what town?
A. Globe, Arizona.
Q. In the last half of the year 1908 what was your business or occupation, or profession?
A. I was a lawyer.
Q. Practicing where?
150 A. In Phœnix, Arizona.
Q. Were you associated with anyone?
A. With Thomas Armstrong, Jr.
Q. What was the name of the firm, if any?
A. Armstrong & Lewis.
Q. At that time where did you have your offices?
A. In what was known as the National Bank of Arizona Building, or the Cotton Block, in Phœnix, Arizona.
Q. Do you know Captain Christy who was a witness on the stand this morning?
A. I do.
Q. Have you ever been associated with him in the practice of law?
A. I was formerly his partner.
Q. Here in Phœnix?
A. Here in Phœnix.
Q. Were you present in the courtroom when Captain Christy testified to a conversation that occurred in the month of October, 1908, in reference to a demand for particulars—a bill of particulars—and also a conversation that occurred about the 30th of November in the office of Armstrong & Lewis?
151 A. I was present in the court room while Captain Christy was testifying.
Q. You heard what the Captain said occurred at that conversation?
A. I did.

Q. Now, Judge, will you, in your own language, and in your own way, take up those conversations and tell where they occurred, how they occurred, and who was present, and what was said.

A. With reference to the demand for particulars, I have no recollection of that at all. With reference to the conversation occurring some time the latter part of November, 1908, I have a recollection of going to Alexander and Christy's office in the Fleming Block and meeting the Captain there—Captain Christy—and having a talk with him in reference to what were known as the lien cases affecting the Noble Building in Phœnix. At that conversation and in that conversation I told the Captain that we were desirous of ascertaining whether or not we could arrive at a settlement in the case. I outlined somewhat our views of the law of the case, and he, upon his part——

Q. In relation to what? What was the law question that was discussed?

A. The law question was in relation to whether the lien of
152 Hugo Richard's mortgage was prior and superior to, or subject and subordinate to the lien of the Thomas Haverty Company for plumbing supplies furnished. In the course of that conversation I outlined to him a prospective plan of settlement, going into details to quite an extent—I could not now assume to recollect the details—and I told him that I thought that if he would accept that plan of settlement that our clients would accept it, and told him that we were anxious to get the whole matter adjusted and out of the way. He said, well, I have no authority to accept any such proposition; I will have to take the matter up with my clients——

By Mr. FRANKLIN:

Q. Pardon me, Judge—this conversation you refer to——

A. I have reference to the first conversation. Practically that is the only difference in my recollection and Captain Christy's recollection of what occurred in those conversations.

Q. You don't remember when you had that conversation?

A. I can't fix it as to date; I can as to place. I fix it in Captain Christy's office, and I recollect this statement as to his authority, and what I am now about to testify as to what occurred there. The
153 Captain recollects it as occurring in our office—to that extent our recollection differs. The Captain said that he had no authority to conclude anything, and that he would have to submit the proposition to his clients. I said, of course the situation is the same with us; you write your people and when you hear from them let us know in regard to what you can do. That is my recollection of the substance of the first conversation that occurred between the firm or either member of the firm and Captain Christy or Captain Alexander.

By Mr. MORRISON:

Q. The next conversation that you recollect was what?

A. The next conversation that I can recollect is a conversation that took place in the evening—when I say evening I mean along

about five o'clock in the afternoon—probably a week or ten days later.

Q. When was this—about what time—what year and what month?

A. It must have been along about the early part of December in the year 1908—it must have been the year 1908—the early part of December, 1908, is my recollection—occurring in our offices—Armstrong and Lewis—the National Bank of Arizona Building. The Captain came over there. I think he is correct in his recollection about there having been some telephone conversation between
154 us, and when he came into the office we went into what was our middle office—Mr. Armstrong's private office—and we had our conversation there. The Captain said that he had heard from the Haverty people and he had a list of the items with him and that we would check over the items and see whether or not—see that we were right in regard to them. And we started to check over the items and discussed them to some extent, and came to this item of freight which he mentions, and—Mr. Armstrong did most of the talking—I doing the listening—and Mr. Armstrong called his attention to the fact that freight was a non-tienable item and properly should not be included in any settlement that might be made; and the Captain conceded that—or rather he said that the argument was probably sound, that the item was not allowable, but that he had no authority to change the condition of the proposition that he had written to his client about, and that Mr. Haverty was coming over very shortly—the cases were coming on—and he would refer the matter to Mr. Haverty, and if Mr. Haverty said the matter was all right, and he would advise him that it was all right, then that item would be stricken out. And we discussed the details of the machinery of settling it. We discussed the matter as to whether or not there should be an assignment of the claim, as I recollect, or whether there should be an assignment of the judgment after judgment was entered, and we mapped out the whole plan of pro-
155 cedure and agreed upon a plan of procedure between ourselves, and my recollection is that Mr. Armstrong stated to Mr. Christy that he would write to the people at Prescott and tell them what we had done. Further than that I can't recollect the conversation.

Q. In the first conversation you related, Judge Lewis, you said that when Captain Christy said, well, we will have to refer this matter to our people, that you replied, well, we are in the same situation—was that the language?

A. Why, I would not assume to say that those were the exact words used. I could not recollect the exact words used at this time, but that was the substance and the import of the actual language that was used.

Q. That you would have to refer to your principals?

A. Whatever construction would be given to the language that I have used is the proper meaning of what was said there at that time.

Q. Now, do you remember what time of the day it was that this last conversation you have related occurred, and what day it was?

A. No sir, I can't recollect the day; I can recollect the hour.

Q. That is the conversation you ended by saying that
156 Thomas Armstrong said that you would write what had been talked over to the people in Prescott. What do you mean by that—the people in Prescott—who?

A. What I meant by it was—or what Mr. Armstrong meant by it, unquestionably, was our clients.

Q. Who?

A. Technically our client was Hugo Richards.

Q. Yes.

A. Actually it was the Bank of Arizona; and the men who had been handling the business from the Prescott end were Judge E. W. Wells and M. B. Hazeltine.

Q. Now, the next day—the day after—was there any further conversation with Captain Christy?

A. I recollect the Captain coming over early in the morning, I think in response to another phone message. I recollect Mr. Armstrong doing the talking. The conversation occurred in our office.

By Mr. FRANKLIN:

Q. Pardon me, Judge, is that the third conversation?

A. That is the third conversation I recollect. It is the
157 first conversation—there must have been a conversation that took place within a day or two after the second conversation that I have talked about. Mr. Armstrong told the Captain that the negotiations were terminated, and there was some further conversation as to the reasons for it, but unless you specially desire that part of the conversation—the point of the conversation was that the negotiations were terminated.

Q. You remember the conversation testified to by Captain Christy that occurred a day or two before the trial of those lien suits in your office?

A. I remember there was such a conversation.

Q. Yes—at the time the Captain says?

A. Well, I don't know whether it was at the time the Captain says or not. If I were called upon to state my best recollection in regard to it, my recollection is that it was the morning of the trial—the morning those cases were to be tried. That is my recollection.

Q. I will refresh your recollection as to that. I think you have reference to the time that Frank Cox and myself——

A. I remember that also, and my recollection is that either shortly before you came over or shortly after you left, Mr. Haverty
158 and Mr. Christy came in, and Mr. Christy introduced Mr. Haverty to Mr. Armstrong and myself. I haven't been asked in regard to anything further.

By Mr. MORRISON:

Q. Well, Captain Christy said, as I recollect, November 14th, the day before the trial—that is my recollection of what Captain Christy said. Now, you remember having a conversation about that time in your office with Captain Christy?

A. I do.

Q. What was that?

A. The gist of it was that Captain Christy, in the presence of Mr. Haverty, made a last request that we arrive at a settlement—that we reach a settlement—to which again Mr. Armstrong took the active part in the talking, and declined. The form of his refusal I do not now recollect, but I do recollect the expression that they had better fight it out.

Q. Do you remember who was present?

A. My best recollection is that Judge Wells was present—or rather, he was not present, but he was the man who was down in Phœnix—my recollection is that Mr. Hazeltine was not in Phœnix.

159 My recollection is that this conversation took place in the front office and that Judge Wells was sitting in Mr. Armstrong's office, which was the second office, and I have no recollection at all as to whether or not Judge Wells and Mr. Haverty met at that time. In fact I think—in fact my recollection is that Judge Wells sat in that back office and Mr. Armstrong and myself met Mr. Haverty and Mr. Christy in the front office.

Q. Well, did the person who was there, Judge Wells, as you suggest, take any part in that conversation?

A. None whatever.

Q. What room did you say Judge Wells, or whoever was there, in accordance with your recollection, was in with reference to your front office?

A. He was in the second office—Mr. Armstrong's office. Both of them were very large offices.

Q. How large?

A. The front office was a room doubtless from twenty-two to twenty-four feet across and twenty-six or thirty feet long. And I should say the middle office was a room about eighteen feet across and probable twenty or twenty-two feet long, the longer way.

Q. What part of the front office was that this conversation that you speak of occurred in?

160 A. Rather toward the front end of it. My recollection is that Mr. Armstrong sat where the safe used to stand.

Q. Where is that?

A. That is about a third of the way from the front of the office. And Mr. Haverty and Mr. Christy, as I recollect it, entered and stood—well, at the ordinary distance from him that men would ordinarily converse where they are talking quietly and in an ordinary conversation. Of course as between men of that sort the conversation was conducted in an ordinary tone of voice.

Q. How far, then, was this party in the other room from where you fix that talking?

A. I should judge that he was twenty feet away and around a corner of the wall—fifteen feet—twenty feet.

By Mr. FRANKLIN:

Q. You are referring to Judge Wells?

A. Yes.

Mr. MORRISON: Take the witness.

Cross-examination.

By Mr. ALEXANDER:

Q. Judge Lewis, your recollection of this matter is not very vivid at this time, is it?

161 A. What I have stated I am clear in regard to my recollection. There are some things that other witnesses have testified to that I can not recollect.

Q. Then you would not state that what Captain Christy testified to, as you say you heard him, was not the case?

A. Absolutely I think Captain Christy has given his recollection of it just as accurately as he can recollect.

Q. You recollect of having phoned to Captain Christy from your office in reference to the matter?

A. At what time, Captain?

Q. At various times.

A. Undoubtedly, yes.

Mr. ALEXANDER: That is all, Judge.

Mr. MORRISON: One moment.

(To the witness.)

Q. In this suit by those lienors to foreclose their liens—this same suit we have been talking about—what about a demand for a bill of particulars upon the defendants, or the plaintiffs, rather?

A. You mean the demand that Armstrong and Lewis made?

162 Q. Yes.

A. In the course of the preparation for the trial of those lien suits demands for bills of particulars were made upon all the various defendants—on all the various plaintiffs—in the various lien suits, as a mere matter of practice, and merely as a matter of procedure in getting ready for trial.

Q. Just the same as it was upon Haverty?

A. Yes, sir, just the same as on Haverty—just the same as on all the rest of them.

By Mr. FRANKLIN:

Q. It was not a mere matter of form, was it, Judge? The information was sought for the purpose of ascertaining what went into the building?

A. We didn't get a bill of particulars against Albright, the architect, for the Judge refused to grant the demand, but in the other cases the Judge granted the demand.

Q. You asked for a bill of particulars from the Haverty Company to find out what was put into the building, or was it a formal thing?

A. It was for the purpose of ascertaining in detail whether or not the items claimed were lienable.

By Mr. ALEXANDER:

163 Q. It was given to you by Captain Christy?

A. I don't think the Captain disobeyed the order of the Court. I think he furnished it.

By Mr. MORRISON:

Q. This was the same as in regard to the other lienholders—given under order of Court?

A. Yes, sir.

By Mr. FRANKLIN:

Q. You didn't get any order for a bill of particulars in the Leonard suit.

A. No, for in that suit they voluntarily gave us a bill of particulars.

(Witness excused.)

THOMAS ARMSTRONG, JR., recalled as a witness in behalf of the defendant, and having already been duly sworn as a witness in this case, testifies further as follows:

Direct examination.

By Mr. MORRISON:

Q. What is your name?

A. Thomas Armstrong, Jr.

Q. What is your profession?

A. Lawyer.

164 Q. How long have you been practicing?

A. About thirty years.

Q. Were you ever associated with Judge Lewis in the practice of law in Phœnix?

A. Yes, sir.

Q. When was that?

A. For some years. I don't remember now just how long. Up to the time of his appointment to the bench about a year ago.

Q. Your firm was Armstrong and Lewis that Captain Christy was talking about in his testimony this morning, was it?

A. Yes, sir.

Q. You heard Captain Christy's testimony with reference to conversations with you relating to this claim of lien on the part of Haverty against the Noble Building?

A. Yes, sir.

Q. Will you be kind enough to tell the jury what happened and what was said at those conversations, beginning with the first one and proceeding in your own way?

A. I can recollect distinctly only two conversations that I had with Captain Christy. The first was in our office in the Bank of Arizona Building.

165 Q. That is, the office of Armstrong and Lewis?

A. Armstrong and Lewis. In the latter part of November, 1908. I remember quite distinctly that Captain Christy came over there late in the afternoon—I think in response to a telephone message from Judge Lewis—but I don't remember about that. We discussed—sitting at one of the desks—Mr. Christy, Judge Lewis and myself—the matter of the Haverty claim for the lien on the

Noble Building, and as to whether or not it was superior in right to the claim of our clients, the Bank of Arizona. The Bank of Arizona had a mortgage on the building, and we claimed that that mortgage was prior in time and right to the Haverty lien claim, and the Court so finally adjudicated it to be. We discussed the possibility of arriving at a settlement of the Haverty case so that our clients might know what they had to pay in order to clean up the liens upon the building. We went over the items of the Haverty lien—whether Mr. Christy at that time said that he had authority from Haverty to settle the matter or not I do not now remember. I do remember checking over the items of Haverty's bill of particulars which I had before me, I think, at that time. We had obtained a bill of particulars at that time from all of the parties to the suit, as I remember. We objected to a number of the items and Captain Christy said that for the purpose of arriving at a settlement they
166 would strike out certain of the items, and I think we arrived at a figure that we told Captain Christy that we were willing to submit to our clients, the Bank of Arizona, and I told him that I would write them a letter advising them of what we had done and asking their approval or disapproval of the matter.

Q. What date was the conversation?

A. I can't remember the date, but my impression is that it was the third or fourth of December.

Q. Judge Lewis was present at that time, was he?

A. Yes, sir.

Q. Well, the next day, or the day after, do you remember any conversation that occurred between Captain Christy and yourself and Judge Lewis, in your office, in relation to this matter?

A. Yes, I remember that the next morning—my recollection is quite distinct that it was the next morning—Captain Christy came to the office—how he happened to come I do not remember—and I informed him that there could be no settlement of the matter.

Q. Now, later on there was another conversation, as stated
167 by Captain Christy, that occurred a day or two before the trial of these lien suits.

A. Well, unfortunately, Mr. Morrison, I can't remember about that at all. I have tried to remember about it, but I can't remember about that talk with Mr. Haverty in the office at all. I am absolutely unable to remember ever seeing Mr. Haverty before the trial of this case. I can't remember a thing about it. I can't testify to anything that occurred because I don't remember.

Mr. MORRISON: Take the witness.

Cross-examination.

By Mr. ALEXANDER:

Q. And so you wrote that letter, then, that you said to Captain Christy that you would write?

Mr. MORRISON: We object to the question as not proper cross-examination. He was not asked if he did or did not.

Mr. ALEXANDER: He said he wrote it.

(To the witness.)

Q. I ask you now, did you write that letter?

Mr. MORRISON: We object to the question.

The COURT: I sustain the objection.

168 Mr. ALEXANDER: On what ground? You can't predicate an objection on the naked question, did you write that letter. It seems to me that is proper—did you write that letter.

The COURT: I sustain the objection.

Mr. ALEXANDER: We take an exception to the ruling of the Court.

The COURT: Proceed.

By Mr. ALEXANDER:

Q. You stated that you told Captain Christy you would write to these people in Prescott of what you had done about the matter with him?

A. Yes, sir.

Q. Now, I ask you now whether you did.

Mr. MORRISON: We object to that question and the objection has been sustained.

The COURT: I don't see what difference it makes.

Mr. ALEXANDER: What ground is the objection based on?

Mr. KIB-EY: Not proper cross-examination.

The COURT: It is not proper cross-examination.

Mr. ALEXANDER: We except to the ruling of the Court.

169 (To the witness.)

Q. So your recollection of these matters is not very good at this time, Mr. Armstrong?

A. Oh, it is not as distinct as I wish it were, Mr. Alexander. I haven't thought about the matter until this suit was commenced a month or so ago.

Q. You were the attorney in this case until this morning?

A. Yes, sir, I prepared the answer in the case.

Q. You prepared the answer in this case?

A. Yes, sir.

Q. Didn't you refresh your memory when preparing the answer?

A. Yes, sir, I have been trying for the last month to refresh my memory in the matter, and I have stated it as I remember it, and I can't state any more nor less.

Mr. ALEXANDER: That is all.

Mr. MORRISON: That is all.

(Witness excused.)

E. W. WELLS, called as a witness in behalf of the defendant and duly sworn, testifies as follows:

170 Direct examination.

By Mr. MORRISON:

Q. What is your name?

A. E. W. Wells.

Q. Where do you live?

A. In Prescott.

Q. How long have you lived in this Territory, Judge?
A. Forty odd years.
Q. Did you ever occupy any official position in this territory?
A. Yes, sir.
Q. Mention some of the later ones.

Mr. ALEXANDER: We object to the question, as immaterial, what official position he has held. I don't see what that has to do with the case.

The COURT: Do you insist upon the question, Mr. Morrison?

Mr. MORRISON: No, but I am surprised at an objection of that kind. I withdraw the question.

(To the witness.)

Q. What association have you with the Bank of Arizona of Prescott?

171 A. Vice President of that Bank.

Q. In the month of December, 1908, did you occupy that same relationship to the Bank of Arizona?

A. Yes sir.

Q. Do you know Captain Alexander who testified in this case and who has been examining witnesses here?

A. I do.

Q. Do you remember the conversation that he related that occurred in the office of the Bank of Arizona on the third of December, as he stated it, 1908?

A. I remember of the time, yes sir.

Q. Will you please state what was said in that conversation and who was present?

A. Captain Alexander and Mr. Hazeltine and myself were present. The Captain came in for the purpose of discussing or talking about the question of the lien of Mr. Haverty against the Noble Building, at which they were trying to reach some conclusion—we were not. I believe the Captain stated that they had arrived at a conclusion or were making some calculation and wanted to know if we would accept it or pay it. The result was—or the answer was,

172 as I remember it, that we did not fully understand the position we were in, especially as to the right of the lien, and we were not ready to do anything in the matter. He then said, in your mortgage which has been foreclosed there is a note of six thousand dollars that has not been—that was not secured by the mortgage, and unless you accept this we will dispute your judgment foreclosing the mortgage which included that note of six thousand dollars. Well, I said, Captain, that is a legal question in the hands of our attorneys, they are responsible to us for the position, if that is the position, and I refer you to them upon that question.

Q. That was with reference to this six thousand dollar note?

A. Yes sir, the six thousand dollar note.

Q. That you referred him to your attorney?

A. Yes sir. Something further was said then with reference to the boilers, and we declined to discuss that, for we were not in shape to discuss the matter. Then he suggested that Mr. Randolph could be induced to purchase the property, and I think I said if Mr. Ran-

dolph or you can work up a deal with Mr. Randolph by which everybody will be paid, we will be perfectly satisfied, but it is with you to do that. I think that is the substance of the conversation.

Q. Captain Alexander, in his evidence this morning, testi-
173 fied that he told you the amount that was talked upon as the settlement, or had been talked upon with Armstrong and Lewis, was $9,313.90, or about that—What was the amount, Captain?

Mr. ALEXANDER: $9,313.90.

By Mr. MORRISON:

Q. (Continuing:) Yes. And Mr. Hazeltine answered, if that offer has been made you why don't you accept it. Do you remember whether any such statement was made?

A. I don't remember of hearing any such statement.

Q. You were present at all that conversation?

A. I was present at the time, yes sir.

Mr. MORRISON: Take the witness.

Cross-examination.

By Mr. FRANKLIN:

Q. Captain Alexander, when he went up there, had a lot of figures about this Haverty lien, and submitted them to you and Mr. Hazeltine.

A. I don't remember of his having any figures there. He might have had.

174 Q. Did he say something about figures?

A. He spoke something of the parties at Phœnix trying to arrive at some conclusions.

Q. Did he mention any amount?

A. I don't remember the amount. He possibly may have mentioned the amount. I don't remember.

Q. He did try to persuade you to include some boilers, didn't he? Didn't the conversation come up about paying for some boilers?

A. I think something was said about the boilers, but we declined to consider it.

Q. Why did you decline to consider the boilers.

A. We were not certain of our status by reason of the lien. That question had not yet been determined in our minds as to whether the lien of Haverty was prior to our mortgage.

Q. Did you say anything about the balance of the building having been changed since the original contract for its erection, since you got hold of it?

A. I think we might have said, possibly, that if we finished the building it would not be according to the present plans.

Q. You had obtained the building?

175 A. I think we had, yes sir, under the mortgage.

Q. And you did change the plans of the building?

Mr. MORRISON: We object to the question as not proper cross-examination.

The COURT: On the question of why he did not want the boilers, it might be proper.

By Mr. FRANKLIN:

Q. You told Mr. Alexander that under the plans as they had been changed you could not use the boilers, didn't you?
A. No sir, from the fact that under the plans I presume probably we could have used the boilers if we had felt disposed to do so.
Q. You didn't want the boilers?
A. I didn't think they were——

Mr. MORRISON: We object to the question.

By Mr. FRANKLIN:

Q. Did you say anything about the boilers to Mr. Alexander?
A. I don't think the question was discussed very much.
Q. It was discussed some?
A. I think the boilers were mentioned, yes sir.
176 Q. What became of the boilers?

Mr. MORRISON: We object to the question on the ground that it is incompetent, irrelevant and immaterial, and not proper cross-examination.
The COURT: I sustain the objection.

By Mr. FRANKLIN:

Q. Messrs. Armstrong and Lewis represented you at Phœnix in all these matters?
A. They were our attorneys.

Mr. MORRISON: We object to the question.
The COURT: The answer is that they were his attorneys, which I understand to be the fact.

By Mr. FRANKLIN:

Q. You were trying to settle up * * *. There were quite a number of lien claims against the Noble Building, were there not?

Mr. MORRISON: We object to the question on the ground that it is not proper cross-examination.
The COURT: He has only been examined about a conversation that he had with Mr. Alexander—in chief. I think now that you are going beyond the proper limits of cross-examination.
177 Mr. FRANKLIN: That is all.
Mr. MORRISON: That is all.

(Witness excused.)

M. B. HAZELTINE, called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct examination.

By Mr. MORRISON:

Q. What is your name?
A. M. B. Hazeltine.
Q. Where do you live?
A. At Prescott, Arizona.
Q. Have you any association with the Bank of Arizona at Prescott?
A. I am cashier of the Bank of Arizona.
Q. How long have you been cashier?
A. Since January, 1897.
Q. Mr. Hazeltine, were you present and did you hear a statement made by Captain Alexander in his testimony this afternoon or this morning in this case, of a conversation that occurred to which you were a party and Judge Wells was present, and on the third of December, 1908, in the bank room of the Bank of Arizona in Prescott?

178 A. Yes sir.
Q. Will you please tell the jury what was said in that conversation—who was present and where it occurred.
A. There was present Captain Alexander, Judge Wells and myself. In the morning of December 3rd, 1908, Mr. Alexander came into the bank and I invited him into what I call my private office, and he stated that his errand was talking over the matter of the adjustment of the Haverty vs. Noble claim. I immediately asked that as Judge Wells was in the lobby, that he be called in, and he was called in, and we three chatted there I should think an hour—on everything—the condition of Phœnix and the crops and some Indian cases that he had come up to defend, and finally he got down to the matter in mind, which was evidently an effort to sell us the claim or lien, or the account, or whatever it was, of the Thomas Haverty Company against what was then known as the Noble Building. Not being an attorney myself I kept out of the conversation pretty much, and the conversation was carried on between Captain Alexander and Judge Wells. Captain Alexander seemed to want to sell us Haverty's claim against the building including I don't know how many dollars—but the amount that does run in my mind is something like $9,314.00—as the price set by him which he or his principals would accept and turn over their claim to the

179 bank. We didn't accept the proposition; we didn't make him any counter proposition; but in the course of the conversation, and apparently to make us feel good, he said that Epes Randolph wanted to come to Phœnix with his office force and his yard force and make Phœnix a great big place. That of course would add to the value of our then-called Noble Building—and that it might be possible to get Mr. Randolph and his office force in the top floor of that building. In fact he didn't know but what we could sell the whole thing to Mr. Randolph. I had heard about that

before and it made no impression, but I think that Judge Wells remarked to Captain Alexander that if he could work up a deal whereby all the parties in interest should get their money, it would be all right. Then there was some more general conversation in the course of which Captain Alexander said that we had recovered a judgment for $76,000.00, interest and costs, against the Noble Building, and that our judgment could be attacked, and would be attacked if we didn't consent to the settlement—on the ground that this six thousand dollars was not covered by the lien of the mortgage. Judge Wells remarked that that matter was in the hands of our attorneys at Phœnix, and in effect—I don't remember the words—they had charge of that suit of foreclosure and he would refer him to them in regard to that. He then said as a fur-
180 ther inducement for us to buy that claim for about $9,314.00, that the Haverty Company, as lienors, had a right of redemption, and would exercise that right unless we settled, the effect of which would be to put off our getting final title to the building for some months. That is the impression it made on me. I don't recollect at the moment anything of import further than I have stated.

Q. Captain Alexander, in his testimony this morning, stated that he told you in that conversation that there was—had been—some kind of arrangement or talk about Haverty selling his lien, or claim, or whatever it was, for $9,314.00, or about that sum, and that you thereupon said that offer has been made why don't you accept it. Do you remember any conversation of that kind—any statement of that character?

A. I don't recollect the statement. I would not swear that I did not make it because we talked for an hour—but I don't recollect the statement.

Mr. MORRISON: Take the witness.

Cross-examination.

By Mr. FRANKLIN:

Q. Mr. Hazeltine, when Mr. Alexander went there he submitted figures to you about this claim of Mr. Haverty?

181 A. It runs in my mind $9,314.00.

Q. Now, didn't he in that conversation urge you to include the boilers in that, and pay for the boilers, too? Wasn't a good part of the conversation about the boilers?

A. Something was said about the boilers.

Q. How much was said about it? Wasn't Mr. Alexander insisting upon your taking the boilers and trying to persuade you to take the boilers?

A. I shouldn't wonder.

Q. Didn't you give him any reason why you didn't want the boilers, in that conversation—tell him why you didn't want the boilers?

A. I don't know.

Q. You wouldn't say that you did not?

A. I didn't do much of the talking—Judge Wells did most of the talking.

Q. You paid attention to the figures?

A. I did.

Q. The cost of the boilers?

A. I did.

Q. Do you remember anything being said about the cost of the boilers?

A. No, I do not.

182 Q. Didn't you take down some figures yourself?

A. No sir.

Q. You didn't figure any at all?

A. I suppose I did, but I haven't got them.

Q. I don't say that you have them now, but you figured?

A. It is customary for me to have a piece of paper and a pencil and to be figuring all the time.

Q. It is in your line to figure?

A. Yes sir.

Q. You probably figured about these things then?

A. Very likely.

Q. The real meat in this conversation that you had was about paying for some boilers, wasn't it?

A. No, the meat in the conversation was the selling of the Haverty claim of judgment to us for $9,314.00—that was the meat.

Q. He wanted you to pay for the boilers in addition?

A. I think the boilers were mentioned as a possible addition.

183 Q. The boilers were not included in the $9,313.90?

A. My recollection is that they were not.

Q. You say they were not included?

A. My recollection is that they were not included in the $9,314.00, but the meat of the proposition was the selling of the claim.

Q. He tried to persuade you to take the boilers, didn't he?

A. I think he did.

Q. In addition to the other items—$9,313.90?

A. That was not in my mind, for that was not the important part of the conversation.

Q. Not from your standpoint?

A. It didn't impress me as the important part.

Mr. FRANKLIN: That is all.

Mr. MORRISON: Just a moment, there is a question I neglected to ask you on direct examination.

Redirect examination by Mr. MORRISON:

Q. Mr. Hazeltine, do you know where you were on the 14th day of December, 1908?

184 A. Yes sir.

Q. And the fifteenth?

A. Yes sir.

Q. Where?

A. In Prescott, Arizona.

Q. Were you present at any time at any conversation in which Captain—to which Captain Christy testified this morning in Armstrong & Lewis' office a day or two before the trial of those lien suits? Were you there?

A. I was not.

Q. Where were you?

A. In Prescott.

Q. Do you remember a conversation that you had with Captain Christy in Prescott? He testified about his going to the Bank and tendering you a transfer or assignment of some judgment.

A. On March 18th, he said.

Q. On March 18th, 19—?

A. Ten.

Q. Ten,—of this year. You remember that conversation?

A. Yes sir.

185 Q. What was it?

A. It was some of it very unimportant, shall I give it all?

Q. No, just the essentials of it in reference to this assignment.

A. It was all in reference to that. I hadn't much more than got my mail open in the morning at nine o'clock and Captain Christy walked in. He and I have been friendly a good many years, and I said, hallo, Captain, what brings you up here in this neck of the woods, or something of that kind. He said, I am sorry to say it is a very disagreeable errand I have to perform, and I said, well, I hope nobody is dead and no great calamity has happened. He said, no, not that, not that, but I want to tender you an assignment of the Haverty claim and demand from you $9,313.90, I think those were the figures he set, and then either in that breath or the next he gave me to understand that if it was not paid suit would be brought. He said there was a contract to the effect that we were going to buy it and that we had not bought it, and he wanted to make a formal demand. I said, Captain, that is not a matter that is very serious at all to drag in between the friendship of you and me; that is a business matter, if you want to bring suit, bring suit, and he said I formally make demand on you for $9,313.90, and I said, I as

186 formally decline. Then he said he had in his pocket—and he reached in his pocket—he said I have here an assignment which I now present—he didn't present it, but that didn't make any difference—and after some little conversation about conditions down here, as we are largely interested in conditions down here—crops, water, farms, and so forth—he went out. That was the gist of it.

By Mr. FRANKLIN:

Q. You would not accept the assignment of the claim?

A. No sir.

(Witness excused.)

E. W. WELLS, recalled as a witness in behalf of the defendant, and having already been duly sworn to testify in this cause, testifies further as follows:

Direct examination by Mr. MORRISON:

Q. The conversation that occurred that has been testified to by Captain Christy and others, that occurred about the fourteenth or fifteenth of December, 1908, in the office of Armstrong and Lewis, relating to the proposed settlement of this Haverty lien or claim—do you remember whether you were present?

A. I was present in their office on the 14th and 15th of that month, yes sir.

187 Q. What have you to say as to having heard any of this conversation that has been related?

A. I don't remember of hearing the conversation at all.

Q. Now, can you state whether Mr. Hazeltine was in town on the 14th or 15th of December, a day or two before the trial of the lienor suits?

A. Mr. Hazeltine was in Prescott and I was in Phœnix to attend the trial of the proceedings that came up then in the Haverty case. I was here for the purpose of attending that trial.

Cross-examination by Mr. FRANKLIN:

Q. How long before you came down to attend the trial had Mr. Hazeltine been here?

A. I don't know.

Q. When did you get down here?

A. I think I got down here on the morning of the 14th, or probably—well, it was the morning of the 14th, I think, that I arrived here—on Monday morning, I think.

Mr. FRANKLIN: That is all.

(Witness excused.)

Mr. MORRISON: That is the case for the defendant.

188 The COURT: Any rebuttal?

Mr. ALEXANDER: That is all.

The COURT: The evidence is now closed, gentlemen of the jury, and we will not take the argument up until tomorrow morning. Meanwhile you should not let anyone talk to you about the case or talk among yourselves or form or express any opinion about it until finally submitted. There are yet the arguments of counsel and the instructions of the Court, and you are likely to form some erroneous opinion unless you dismiss the matter out of your minds until you come back at half past nine o'clock tomorrow morning.

(Thereupon Court adjourns until 9:30 A. M., Tuesday, May 24, 1910.)

TUESDAY, *May 24th*, 1910—9:30 a. m.

At this day the plaintiff and defendant hereto being present in Court by their respective counsel, thereupon the following proceedings are had herein before the said jurors are called into the court room, and during their absence therefrom, to-wit:

Mr. KIBBEY: We desire to make a motion that the Court direct the jury to return a verdict for the defendant. At the close of the evidence for the plaintiff a motion of that kind was made and
189 overruled by the Court on the theory that possibly there should be some evidence to go to the jury on the question of fact. Since that time evidence for the defense has been put in. It is hardly necessary to remind the Court that the old rule of the scintilla of evidence to warrant the case to go to the jury has been practically abrogated, and that the modern rule is that the Court will consider it in the light you are considering it if you entertain a motion for a new trial. Briefly I desire to present what we think the facts are in this case. There is a singular lack of conflict of evidence: so far as the facts have been testified to they are pretty well established; but after all it is pretty nearly a question of law to be determined by the Court from the facts. The testimony of Captain Christy, if taken as true, does not establish an agency at all, in fact it rebuts it. Christy states that he had not authority from his client to make this arrangement, and Lewis testified that he said we are in a like situation. Christy does not deny that. And it is easy enough—there can be no doubt that during the preliminary conversations there was in the minds of both parties at that time that neither side had yet received authority from their principal to make this or a similar arrangement. As a matter of law, the power to make this compromise, and it is more than a compromise—to purchase this claim—cannot be inferred from the relation of attorney and client. An attorney has no
190 right to make any such arrangement without authority from his client—there must be expressed authority. (And so forth—further argument of counsel on the motion not taken down by the reporter.)

The COURT (at the conclusion of argument): I think there is sufficient evidence in the case to go to the jury. It will be a matter of fact and not of law. I think there are two questions of fact on which I shall charge the jury—two principal questions of fact: first, whether or not any completed, consummated contract between Armstrong and Lewis and Mr. Christy was made, or whether the contract was merely a tentative one that never was completed by reason of this extra proposition, or by any other reason. They have to find as a matter of fact that there was such a completed contract before they can find for the plaintiff in any event, and of course it is upon the plaintiff to establish that. Second, they have to find that Armstrong and Lewis were clothed with special authority to make this contract, because it would not be within their ordinary purview of attorney and client to make a contract of this kind. They either must have special, direct authority from the principal, or the principal must by some act have acquiesced in the contract, if any was made, with knowledge of it; and that is for the plaintiff to show

also in the case. Those are the two principal facts that I
101 shall charge the jury that they must find in the case. Call in the jury.

(Thereupon the jurors return into Court and are called by the Clerk, all answering to their names.)

The Court: Inasmuch as I suppose the reporter took down the statement that I have just made, I will state that inasmuch as counsel seem to have submitted a number of requests for instructions, I shall probably not give any such instructions as I stated, but shall follow the instructions requested by counsel. I intended to charge the jury in my own way, but as long as counsel have made these requests I shall give them.

Mr. Kibbey: We are content with the statement made by the Court.

The Court: I cannot give the instructions which I outlined and all these instructions too. I will be very happy to take the instructions submitted to me if there is anything in them that I want, but if they are submitted as a request I either have to give them or refuse them.

Mr. Kibbey: We are simply offering them as an aid to the Court: we do not request that they be given.

(Thereupon follows the argument of both counsel for the
102 plaintiff and for the defendant to the jury, at the conclusion of which the Court instructs the jury orally, as follows:)

The Court (orally): Gentlemen of the Jury: This is an action brought by the Thomas Haverty Company as plaintiff against the Bank of Arizona as defendant. The plaintiff, Thomas Haverty Company, claims in the case that the defendant, the Bank of Arizona, about the 30th day of November, 1908, promised to purchase a certain claim against John Noble and a lien on the Noble Building belonging to the plaintiff company, and to pay therefor the sum of $9,313.90; that the terms of purchase were that Thomas Haverty Company was to proceed to reduce the claim upon which suit had been brought to judgment and thereafter assign the judgment to the Bank of Arizona, and the plaintiff claims that the terms of purchase were all agreed upon both by the Bank of Arizona and the Thomas Haverty Company through their agents, and that the terms of purchase were afterwards all performed by the plaintiff company but the defendant, the Bank of Arizona, has refused to take an assignment of the lien after reduced to judgment, and has refused to pay the plaintiff the sum of money agreed upon therefor. That is the claim of the plaintiff: the defendant denies that any such agreement or promise was made by it—that no such consideration was offered and no such promise made—and that the Haverty Company
103 never carried out the terms which it was to perform. Now, this action is brought by the Haverty Company against the Bank of Arizona. The Haverty Company is the plaintiff, and the plaintiff in a civil action must establish to the satisfaction of the jury by a preponderance of the evidence the claim which it makes.

In this case it must establish that the agreement was made as alleged and as it has been alleged by them in the complaint, and that if it was made it was made by a person or persons authorized to make it for their principals, for it is not claimed that the principals directly made the agreement, but that it was made by their attorneys. The plaintiff must also show that it carried out the terms of the agreement on its part to be performed.

Now, the two vital things for you to determine in the case, you being as jurors the judges of the facts in the case and having to determine what the result of this trial shall be according as you find the facts of the case to be, applying to the facts the law as I, the Court, give it to you—you being the judges of fact in the case, the two principal things to be determined by you in this case are these: first, was there ever any agreement made between Alexander and Christy on the one side and Armstrong and Lewis on the other—that is, was there any agreement ever arrived at by those two firms—a complete and settled agreement or understanding. Of course you know, gentlemen, that before a contract can be made both
194 sides must understand and agree to the terms of the contract, otherwise there is no complete understanding between the parties, and without a complete understanding and agreement on both sides there is no legal and binding contract. Now, therefore, the first question to determine in this case is, was there any complete agreement or understanding arrived at between Armstrong and Lewis on the one side and Alexander and Christy on the other, as attorneys. Now, if there was any essential particular of this proposed agreement unsettled at the time of the alleged making of it, as, for example as claimed here, a difference of an amount to be paid for freight on machinery, and which was afterwards to be submitted to the principals by the attorneys making the agreement, and there is no evidence to your satisfaction showing that such amount was afterwards settled and agreed upon, then you would find that there was no contract made in the case, provided that was an essential particular of the contract. If, however, in this case you find there was an agreement made and entered into between these two lawyers on the one side and the two lawyers on the other side before this question of freight came up, then that would not necessarily vitiate or alter the original contract. If, however, that question of freight on the machinery was part of the contract and it was not settled, then there was no binding contract
195 entered into because there was no agreement in the minds of both attorneys on both sides. Therefore, you have to find in this case, first, was there a fixed and settled agreement entered upon between these parties. Now, that the plaintiff has to establish to your satisfaction by a preponderance of the evidence, as it does every fact to be determined in the case. So if you should find that fact for the Haverty Company, namely, that there was a definite and distinct understanding and agreement entered into, then you have to go a step further and find out whether or not Armstrong and Lewis were authorized to represent the Bank of Arizona to make such agreement, provided

you find that there was such agreement. The testimony is undisputed that Armstrong and Lewis were acting as attorneys or as counsel for the Bank of Arizona in this law suit pending here in respect to their claims pending on the Noble Building. Now, as such attorneys for the Bank of Arizona they had certain authority: they had authority to act in certain matters without referring to the Bank of Arizona: they had authority to take whatever steps might be necessary in the conduct of the case without each time having to go to the Bank of Arizona to get their authority, and in so acting the Bank of Arizona would be bound by the action of Armstrong and Lewis. But in this matter of the purchase of a claim of another person for this sum of $9,313.90 Armstrong
196 and Lewis had no authority to bind the Bank of Arizona so that they woud be bound to pay this sum of $9,313.90 without first obtaining authority from the bank in that regard. In other words, it was not a matter within the scope of their employment as lawyers in that case, therefore before they could bind the Bank of Arizona to the purchase of that claim of $9,313.90 they had to have authority from the Bank of Arizona therefor; or if they assumed to contract for the Bank of Arizona to purchase it, then the Bank of Arizona must afterwards, with knowledge of the facts, ratify their action before the plaintiff in this case can recover on any such agreement, if it was made. Therefore, the second thing for you to determine is, if you find there was a contract (for if you find there was no contract, that ends the case)— if you find there was a contract, then you have to find as a matter of fact whether there was any authority given by the Bank of Arizona to Armstrong and Lewis to make the contract, or if there was no direct authority given in advance, whether they afterwards (and by they I mean the Bank of Arizona) ratified the action of Armstrong and Lewis in making the contract, if any contract was made. Now, it is not necessary that the plaintiff should prove a direct authorization from the Bank of Arizona to Armstrong and Lewis in so many words in order to recover. It has to prove to your satisfaction by a
197 preponderance of the evidence that such authority either was given or that there was a subsequent ratification of it, but it is not necessary that he should prove it by a direct statement from an officer of the bank that there was such authority. It is sufficient if you are satisfied by a preponderance of the evidence from the conduct of the parties—that is, the conduct of the bank or its officers—or from statements made by them, or from their acquiescense in other statements, if there were any, that there was such authority.

I may say in this connection that there was some reference by counsel with respect to privileged communications here and letters not introduced in evidence. Now, you are not to assume that because the Court has excluded any letters offered here to be put in evidence that those letters contain anything at all that would indicate there was any such authority. You are not to conclude that because they were excluded the letters contained anything like that. They were excluded because they are in law privileged com-

munications, being communications made from client to lawyer, and they are excluded on that ground, and the mere fact that they are excluded is no reason why you are to assume that those letters if admitted would contain any evidence. Furthermore, there is another thing. It has been referred to by counsel that the Haverty
Company has not been paid by anybody for the amount of
198 labor and material in the Noble Building. That has nothing to do with the case at all. The Haverty Company did not put these materials in there at the request of the Bank of Arizona; they put them in at the request of Noble and they have a judgment against Noble for them, and the fact that they have not been paid that judgment or have not received any money for it is no reason why the Bank of Arizona should pay them unless there was an agreement or contract on the part of the bank to pay them. Of course, if there was an agreement or contract on the part of the Bank of Arizona to pay the nine thousand and odd dollars for the claim and that agreement was made by their authority or by the subsequent ratification by the bank, then the bank is bound to pay it; but it would only be bound to pay it because of such agreement and such authority to make the agreement if any such existed. I want that to be plain in your minds that what they are suing for is a breach of the contract—the Haverty Company claim these people agreed to buy this claim through their agents, and that those agents, the attorneys, had authority to do it, and that they are now refusing to do it and trying to back out of it. If that is your opinion, and you are satisfied by a preponderance of the evidence that such is the fact, you ought to render a verdict for the plaintiff, and it should
be in the amount demanded, $9,313.90, and I have put the
199 that amount in the form of the verdict finding for the plaintiff. Of course if you do not find for the plaintiff, your verdict is simply for the defendant in the case.

Now, there are one or two matters that I think I have covered in the instructions already given; if I have not I will give them in the language that counsel request.

The Court instructs the jury that the appearance of the authority of an agent to act which will be sufficient to estop the principal as against other persons need not arise solely from the transactions had between persons affected by the agent's acts and the principal. The presumption of authority may be inferred from the agent's acts in other transactions of similar character at or about the same time. Of course that presumption, gentlemen, if found to exist, may be overcome by evidence interposed by the defendant.

You may take into consideration such inferences as reasonable and prudent men you may draw from the relative position and situation of the parties, and this may have influence with you in determining the probability or improbability that the alleged agreement was made as claimed by the plaintiff without any agreement or understanding that it was to be submitted to the bank or its officers for approval before it was to take effect.

200 The conduct of the parties after the alleged making of the agreement in question as to their understanding whether it had ever been made or not may be taken into consideration by you in determining the facts with respect to the making or not of the agreement in question.

The general employment of an attorney at law by a client does not confer upon the attorney power to compromise a claim or to purchase an adverse interest.

In this case by their general employment as attorneys at law to represent the defendant in matters then in litigation Armstrong and Lewis had no right to enter into an agreement as that set out in the complaint to purchase the claim of the plaintiff without either express authority from the bank or ratification of their action by the bank afterwards.

Now let me say again to you these are the two vital questions to determine in the case, first, was there any agreement at all ever definitely decided upon and entered into between these two firms of lawyers; second, if you find there was such an agreement and it was as claimed by the plaintiff, then did those lawyers have authority from the bank to enter into it, and has that fact been proved to you by a preponderance of the evidence; or if they did
201 not have direct authority in the first place, did the bank, with full knowledge of it, afterwards ratify it and adopt it as their own. If you find the negative of either of these facts then you must bring in a verdict for the defendant: if you find the affirmative of the first question, that is that there was such an agreement entered into between the respective firms of lawyers, as claimed by the plaintiff, then you have to go further and find if they had authority to make it. According as you find you render your verdict in the case. Swear a bailiff. (Bailiffs sworn.) (To counsel.) Gentlemen, I propose with your concurrence in the case, inasmuch as it is ten minutes past twelve, to send the jury out to lunch, the costs to be taxed by the successful party in the case. (To the jury.) You will be taken out to lunch by the Sheriff and the sheriff will pay for the dinner and the one that loses in this law suit will pay him.

(Thereupon the jurors retire from the court-room in charge of their sworn baliffs.)

TERRITORY OF ARIZONA,
County of Maricopa, ss:

I, Jos. S. Jenckes, official court reporter of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, do hereby certify that, as such re-
202 porter, I was present at the trial of the above-entitled cause at Phœnix, Arizona, on May 23rd and 24th, 1910; that I took notes of all proceedings had therein, including all oral motions, orders, requests, rulings, actions, and questions propounded to and answers of jurors upon their voir dire examination, and of witnesses called to testify in the cause, the instructions of the Court to the jury, together with such other matters as I was instructed by the

Court to note during the progress of the trial; that I have transcribed my notes so taken, and that the foregoing transcript is a full, true and correct transcript of the same.

Witness my hand this 27th day of July, A. D. 1910.

JOS. S. JENCKES,
Official Court Reporter.

I hereby certify that the foregoing transcript is a correct statement of the proceedings had upon the trial of the above-entitled cause, and the same is hereby allowed and signed as defendants' second bill of exceptions this 13th day of September, A. D., 1910.

EDWARD KENT, *Judge.*

Deposited in office of Clerk of District Court, 9th August, 1910.

203 And on to-wit: the tenth day of January, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Jos. H. Kibbey, Esq., attorney for appellant herein, it is ordered by the Court that oral argument be granted in this cause, and the hearing set for January 12, 1911.

And on to-wit: the twelfth day of January, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause coming on for hearing was argued by Jos. H. Kibbey, Esq., for appellant, and Alfred Franklin, Esq., for appellee, and cause ordered submitted.

204 And on to-wit: the twenty-seventh day of March, 1911, there was rendered by said Supreme Court and filed in the clerk's office, in said entitled cause, a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1176.

THE BANK OF ARIZONA, Appellant,
vs.
THE THOMAS HAVERTY COMPANY, Appellee.

Appeal from the District Court of Maricopa County.

Hon. Edward Kent, Judge.

Robert E. Morrison, and Kibbey, Bennett & Bennett, for Appellant.
Alexander & Christy, and Alfred Franklin, for Appellee.

Opinion by Doan, J.

On March 18th, 1910, the appellee, as plaintiff, brought suit against the appellant in the District Court of Maricopa County, and alleged in its complaint that in February, 1908 plaintiff had a claim against one John Noble in the sum of $14,306.00 for materials and labor furnished in the construction of the Noble Building in Phœnix, Arizona, which claim was secured by a lien theretofore perfected on the building and the lots on which the same was situated, and
205 by suit instituted on such claim in March 1908, in the District Court of Maricopa County; that at the time of the institution of said Action Hugo Richards held a mortgage upon the said premises; that the loan secured by said mortgage was made by the Bank of Arizona, the appellant herein, and that the note and mortgage were taken in the name of Hugo Richards for the use and benefit of the said bank, as the real party in interest; that while the said action was pending, about the 30th day of November, 1908, the defendant bank offered to purchase "the plaintiff's said demand and claim for lien therefor, and promised that if the plaintiff would agree to sell to the said defendant its said demand and claim for lien, and would promise and agree to prosecute its said suit thereon to judgment, and would promise and agree to thereafter assign the same to the said defendant, that it, the said defendant, would buy the plaintiff's said demand and claim of lien of the said plaintiff and would pay to the plaintiff therefor the sum of $9,313.90 at the time of the assignment of said judgment to the defendant; the said sum of $9,313.90 being then the amount claimed by said plaintiff as a lien upon the said Noble Building, less the sum of $4,992.10, the said sum of $4,992.10 being the value of two certain boilers and a certain heating apparatus and certain tools furnished and delivered by the plaintiff and used in and toward the erection, construction and
206 completion of the said Noble Building, and for which the plaintiff claimed a lien upon said building and the lots of land upon which the same is situated, and which said boilers, heating ap-

paratus and tools the plaintiff should be at liberty to remove from the said Noble Building, if the same could be done without injury thereto; that thereupon the plaintiff then and there did promise and agree with the defendant to sell to the said defendant its said demand against the said John Noble and its said claim for lien upon said premises, and did promise and agree to prosecute the said action, and agree to assign said judgment recovered therein to this defendant."

The complaint then alleges prosecution of said action by the plaintiff, recovery of judgment therein in the sum of $12,429.22, together with a foreclosure of the Lien; the offer of plaintiff to assign the said judgment to the defendant, the refusal of the defendant to accept same or pay therefor, and the tender of such assignment in court.

Defendant demurred generally to the complaint, entered a general denial, and alleged failure to perform by reason of the amount of the judgment being $12,429.22, and the fact that the lien established by the judgment was decreed to be subject to the defendant's mortgage as a prior lien. The case was tried to a jury which returned a verdict in favor of the plaintiff for $9,313.90, in accordance with
207 which verdict the court rendered judgment for that amount against the defendant in favor of the plaintiff. From this judgment and the denial of a motion for a new trial, the defendant has appealed.

It is assigned as error,—

First. "That the court overruled the appellant's demurrer to the complaint because upon the facts stated in the complaint, the alleged contract by which it was claimed the appellant agreed to purchase the judgment thereafter to be obtained by the appellee (the Haverty Company), was wholly without consideration; that the consideration therefor had wholly failed, and that appellee had not performed its part of the alleged agreement."

The argument in support of this assignment is made entirely upon the ground of failure of consideration. It is conceded that the mutual promises were each the consideration for the other, but it is claimed that there was a failure of consideration by reason of the judgment recovered in the case being $12,429.22. Appellant urges in support of this assignment the argument that the contract alleged in the complaint was a conditional one, that if certain boilers could be removed from the building the claim was to be reduced to $9,313.90, and if so reduced, the judgment secured on said claim should be assigned to the bank.

The extract from the complaint (supra) alleges that the offer on the part of the defendant was to pay $9,313.90 for the
208 $14,306.00 "demand and claim of lien therefor," and that if the boilers, heating apparatus and tools which represented the other $4,992.10 could be removed from the building without injury thereto, the plaintiff was at liberty to remove them. The inference being that unless such removal could be made without injury to the building, they would remain therein. The argument in support of the failure of consideration is refuted by the language of the allegation in the complaint, that if the plaintiff should "prose-

cute its said suit thereon to judgment and would promise and agree thereafter to assign the same to the said defendant," there being no agreement or guarantee as to the exact amount of the judgment, other than that it should be the judgment recovered in that case.

Second. (*a*) That the evidence showed that the appellee had not performed its part of the alleged agreement in that it obtained a judgment for $12,429.22 instead of $9,313.90, as the alleged agreement provides, and that the judgment recovered by the Haverty Company (appellee) established the lien thereof as inferior and subordinate to that of Hugo Richards, the representative of the bank (appellant) instead of, as it was claimed by appellant to be, superior to that of Richards (the bank)."

Again the appellant ignores the plain language of the alleged agreement and bases its assignment upon a provision that
209 is not included in its terms and cannot be inferred therefrom.

The alleged agreement (above cited) does not provide for a judgment for $9,313.90, or any other definite sum, neither does it provide that the lien thereof should be decreed to be superior to that of Richards. The deal seems to have been made because of the uncertainty as to the priority of the lien. It was contended by counsel for the bank that the lien was inferior to that of Richards, and by counsel for the Haverty Company that it was superior thereto; neither party appeared to be confident of the correctness of his position. This uncertainty resulted in the compromise by which the Haverty Company would receive a sum less than its full claim, and the chance of being able to remove and retain the material representing part of the balance, and the bank would avoid the danger of having to pay more than the cost of that part of the materials furnished than it could use to advantage under the modified plans for completion of the building they were then acquiring under foreclosure proceedings. If the counsel for the bank had felt certain that the lien of the claim was superior to the mortgage lien, they would probably have been willing to pay the face value of the claim. If counsel for the Haverty Company had felt certain of the priority of the lien over that of the mortgage, they would not have sold it nor agreed to sell it for less than the full face thereof,
210 $14,306.00.

(*b*) "That the verdict of the jury is not supported by the evidence, in this, that the evidence fails to show the agency of Armstrong & Lewis, or either of them, to enter into an agreement to purchase the Haverty claim."

This issue was presented by the court to the jury as a question of fact and they were fully instructed by the court that unless the agency of Armstrong & Lewis, or the ratification by the defendant bank of this deal by them with the Haverty Company was established to their satisfaction by the preponderance of the evidence, they should find for the defendant. The verdict of the jury on this issue based upon the conflicting evidence in the case, will not be disturbed by this court.

(*c*) "That the evidence was not sufficient to prove that the alleged

agreement had in fact been entered into because some of its terms had not been assented to."

Here again the jury have differed with the appellant as to the sufficiency of the evidence, after having heard it from the witnesses and having been fully instructed relative thereto by the court.

Third. "That the court erred in overruling appellant's motion for a new trial because of the improper comments by counsel for the appellee in his argument to the jury, in the statement that 'The
211 facts that Armstrong & Lewis, attorneys for the defendant, had authority to enter into this agreement (meaning the agreement set up in the complaint) from their client (meaning the defendant herein) might perhaps be proved by letters that may have passed between them. We (meaning the plaintiff) tried to get these letters but they (meaning the counsel for defendant) refused to produce them upon the ground that they were privileged because they were communications between attorney and client, and the court so ruled. We, therefore, have to resort to other evidence as to the conduct of the parties, etc., etc.'"

The language of counsel, while the propriety of it might be questioned, does not, we think, constitute reversible error. It might be entitled to be considered as an explanation by counsel to the jury of their failure to establish agency by the best evidence. The appointment of an agent, or the direct statement of the principal authorizing the agent to act as such, constitute the best evidence, and ordinarily, if obtainable, can be introduced in evidence to show agency. In this case, Armstrong & Lewis, who are claimed to have been the agents of the bank, were the attorneys of the bank in the litigation relative to the entire subject matter here in issue; the trial court had excluded certain letters which counsel for appellee contended contained authority to Armstrong & Lewis to act as the bank's
212 agents, and counsel evidently was undertaking to explain to the jury why he had to rely upon circumstantial rather than direct evidence of agency. The instructions of the court on this subject were very clear and explicit to the effect that no inference could be drawn by the jury from the exclusion of the letters that they contained any evidence that would tend to establish agency, but that their exclusion was simply upon the theory that they contained privileged communications between client and counsel which rendered them inadmissible.

Fourth. "That the court erred in overruling appellant's motion for a new trial upon the ground that the court had denied appellant's motion that the court direct the jury to return a verdict for appellant upon the conclusion of the evidence offered by appellee."

Fifth. "That the court erred in denying appellant's motion upon the conclusion of the introduction of all the evidence in the case to direct the jury to return a verdict for the appellant."

These two assignments may be considered together, and are untenable as the record discloses sufficient evidence to warrant the submission of the case to the jury to determine the facts, and likewise sufficient evidence to support the verdict of the jury for the plaintiff in the amount claimed. It is not necessary to cite the evi-

dence, or even extracts from it, but it will suffice to say that the testimony of Christy is sufficient to establish the transaction
213 claimed with Armstrong & Lewis, and his testimony, with that of other witnesses, established facts tending to show the agency of Armstrong & Lewis and the recognition of such agency by the bank.

Sixth. "That the court erred in admitting in evidence the declarations of Thomas Armstrong and E. W. Lewis as to their agency for the appellant to make the agreement sued on."

The declarations in question occurred in the course of negotiations between the parties and were not admitted to prove agency, but for the purpose of showing the contract between the parties, if Armstrong and Lewis had authority to make it on behalf of the appellant.

No error appearing in the record, the judgment of the lower court is affirmed.

FLETCHER M. DOAN,
Associate Justice.

We concur.

JOHN H. CAMPBELL,
Associate Justice.

EDWARD M. DOE,
Associate Justice.

Mr. Justice Lewis, being disqualified, took no part in the consideration of this case.

214 And on the same day to-wit: the twenty-seventh day of March, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order and Judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1176.

THE BANK OF ARIZONA, Appellant,
vs.
THE THOMAS HAVERTY COMPANY, a Corporation, Appellee.

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be and the same is hereby, affirmed.

It is further ordered, adjudged and decreed, that the appellee herein do have and recover of and from the appellant herein, The Bank of Arizona, and of and from Hugo Richards and M. B. Haseltine, the sureties on the Cost and Supersedeas appeal bond herein, the sum of Nine Thousand Three Hundred and thirteen and 90/100 ($9,313.90) Dollars, with interest thereon at the rate

of six per cent per annum from the 18th day of March,
215 1910, until paid, and the further sum of One Hundred and 25/100 ($100.25) Dollars costs in the court below in this cause incurred by the appellee, together with the costs of appellee incurred in this court taxed at Thirty-four and 80/100 ($34.80) Dollars, and the accruing costs in the court below, and that appellee have execution therefor.

And on to-wit: the fifth day of April, 1911, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause his certain Motion for Re-hearing, in words and figures following, to-wit:

216 In the Supreme Court of the Territory of Arizona.

No. 1176.

THE BANK OF ARIZONA, Appellant,
vs.
THE THOMAS HAVERTY COMPANY, Appellee.

Motion for Rehearing.

Comes now the appellant The Bank of Arizona, and moves the Court for a rehearing herein, for the reasons that the Court in its decision has not passed upon the question presented by appellant's VII assignment of error, that is—

VII.

Because the court erred in admitting the evidence of Thomas Armstrong, a witness, as to communications or the fact of communications he made to the appellee (appellant) his client.

This, we submit, was a serious error of the court below, and prejudiced the appellant. Appellant begs leave to file a supplemental brief in support of this motion.

KIBBEY, BENNETT & BENNETT,
Attorneys for Appellant.

217 And on to-wit: the fourth day of May, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant be submitted.

And on to-wit: the sixth day of May, 1911, being one of the regular juridical days of the January term of said court, 1911, the

following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, and heretofore submitted, be, and the same is hereby denied.

And on the same day to-wit: the sixth day of May, 1911, being one of the regular juridical days of the January term of said
218 court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day comes Jos. H. Kibbey, Esq., for appellant herein, in open court, and gives notice of appeal to the Supreme Court of the United States from the Judgment of this Court, and

Upon motion of Jos. H. Kibbey, Esq., it is ordered that the appeal be, and the same is hereby allowed, and the amount of the Supersedeas Bond be fixed in the sum of Twenty thousand ($20,000.) Dollars.

219 And on to-wit: the first day of July, 1911, came the Plaintiff in Error by its Attorneys and filed in the clerk's office of said court in said entitled cause, its certain Petition for Writ of Error, in words and figures following, to-wit:

UNITED STATES OF AMERICA,
Territory of Arizona:

In the Supreme Court of the Territory of Arizona.

THE THOMAS HAVERTY COMPANY, a Corporation, Plaintiff Below and Respondent in Error,

vs.

THE BANK OF ARIZONA, a Corporation, Defendant Below, and HUGO RICHARDS and MOSES B. HAZELTINE, *and* Plaintiffs in Error.

Petition for Writ of Error.

Comes now the above named The Bank of Arizona, defendant below, and Hugo Richards and Moses B. Hazeltine, plaintiffs in error, and say that heretofore, to wit, on the 25th day of May, 1910, a judgment was entered in a cause wherein the above named The Thomas Haverty Company was plaintiff and the above named The Bank of Arizona was defendant, in the District Court of The Third Judicial District of the Territory of Arizona, in and for the
220 County of Maricopa, whereby the said The Thomas Haverty Company recovered of and from the said The Bank of Ari-

zona the sum of $9,313.00 with interest thereon at the rate of six per cent per annum from the 18th day of March, 1910, until paid, and costs of suit fixed at $100.25; that thereafter upon an appeal from said judgment to the Supreme Court of the Territory of Arizona, the said judgment of said District as aforesaid was by said Supreme Court of the Territory of Arizona, on the 27th day of March, 1911, in all things affirmed, and said Supreme Court of the Territory of Arizona in said cause thereupon rendered judgment in favor of said The Thomas Haverty Company (appellee) and against the said The Bank of Arizona (appellant) and Hugo Richards and Moses B. Hazeltine (by the name of M. B. Hazeltine) the sureties upon the appeal and supersedeas bond given by said appellant the said The Bank of Arizona for the sum of $9,313.90, and interest thereon from the 18th day of March, 1910, at the rate of six per cent per annum, and costs of suit; that thereafter, to-wit, on the 6th day of May, 1911, the said Supreme Court of the Territory of Arizona, by the order on that day in said Court in said cause duly made and entered, denied the motion of the said The Bank of Arizona, for a rehearing of said cause in said Supreme Court of the Territory of Arizona, by all of which

221 the said The Bank of Arizona and the said Hugo Richards and the said Moses B. Hazeltine are aggrieved in that in said judgment of said District Court, and of said Supreme Court of the Territory of Arizona, and in the order denying the motion of the said The Bank of Arizona for a rehearing of said cause, and in the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said The Bank of Arizona, the defendant and appellant below, and Hugo Richards and Moses B. Hazeltine now plaintiffs in error, all of which will appear more in detail from the assignment of errors filed with this petition.

Wherefore this plaintiff in error, the said The Bank of Arizona, Hugo Richards and Moses B. Hazeltine pray that a writ of error may issue to the Supreme Court of the United States for the correction of the errors complained of, and that a duly authenticated transcript of the record proceedings and papers herein may be sent to the said Supreme Court of the United States.

WALTER BENNETT,
Attorneys for The Bank of Arizona, Defendant and Appellant Below, and Now Petitioner for Writ of Error.

222 And on the same day to-wit: the first day of July, 1911, there was filed in the clerk's office of said Court in said entitled cause a certain Order granting Writ of Error in words and figures following to-wit:

UNITED STATES OF AMERICA,
Territory of Arizona.

In the Supreme Court of the Territory of Arizona.

THE BANK OF ARIZONA, a Corporation, Appellant, and HUGO RICHARDS and MOSES B. HAZELTINE,
vs.
THE THOMAS HAVERTY COMPANY, a Corporation, Appellee.

Comes now the above named, The Bank of Arizona, appellant, and Hugo Richards and M. B. Hazeltine sureties on the appeal bond on this 30th day of June, 1911, by their attorneys Kibbey, Bennett & Bennett, and file and present to John H. Campbell one of the Associate Justices of the Supreme Court of the Territory of Arizona, their petition praying for the allowance of a Writ of Error intended to be urged by them, and praying further that a duly authenticated transcript of the record proceedings and papers upon which the judgment therein was rendered by said Supreme Court of the Territory in the case of The Bank of Arizona, Appellant and The Thomas Haverty Company, Appellee, may be sent to the Supreme Court of the
223 United States, and that such other and further proceedings may be had in the premises as may be just and proper, and upon consideration of the premises the court does hereby allow the Writ of Error, provided however, that said The Bank of Arizona, Hugo Richards and Moses B. Hazeltine the said petitioners give bond according to law in the sum of Twenty Thousand ($20,000.00) Dollars, which said bond shall operate as a supersedeas bond.

Witness, John H. Campbell, one of the Associate Justices of said Supreme Court this 30th day of June, 1911.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on to-wit the same day the first day of July, 1911, there was filed in the clerk's office of said court, in said entitled cause a certain Assignment of Error sought to be reviewed by the Supreme Court of the United States in words and figures following to-wit:

224 UNITED STATES OF AMERICA,
Territory of Arizona:

In the Supreme Court of the Territory of Arizona.

THE BANK OF ARIZONA, a Corporation, Defendant and Appellant; Hugo Richards and Moses B. Hazeltine, Sureties on Appeal Bond, Plaintiffs in Error,

vs.

THE HAVERTY COMPANY, a Corporation, Plaintiff and Appellee, and Now Defendant in Error.

Assignment of Error Sought to be Reviewed by the Supreme Court of the United States.

Comes now the above named The Bank of Arizona, defendant and appellant below and Hugo Richards and Moses B. Hazeltine sureties on appeal bond, now plaintiffs in error in the Supreme Court of the United States, and say that there is manifest error in the judgment rendered by the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, and in the judgment of the Supreme Court of the Territory of Arizona, in affirming said judgment of said District Court and refusing the Motion of the Bank of Arizona for a new trial in said cause and rendering judgment therein against the said The Bank of Arizona, appellant and Hugo Richards and Moses B. Hazeltine (under the name of M. B. Hazeltine) sureties upon the appeal bond of the said Bank of Arizona, and in the proceedings prior thereunto in the
225 progress of said cause in this, that is to say:

That the Supreme Court of the Territory of Arizona, erred in its judgment affirming said judgment of said District Court, and in rendering judgment against the said The Bank of Arizona and Hugo Richards and Moses B. Hazeltine and in denying the Motion of said Bank of Arizona for a rehearing of said cause, because:

I.

The said District Court overruled the demurrer of the said Bank of Arizona to the complaint, because the agreement alleged therein appeared by the said complaint to be without consideration, that the consideration therefor had failed and that the defendant in error, the said Thomas Haverty Company had not performed its part of the alleged agreement.

II.

The evidence shows that the defendant in error had not performed its part of said alleged agreement in that it obtained a judgment for $12,429.22 instead of $9,313.90, as the alleged agreement provides, and that the judgment recovered by the suit the Thomas Haverty Company established the lien thereof as inferior and subordinate to that of Hugo Richards the representative of the said The Bank of Arizona (plaintiff in error here) instead as it was claimed by the said Thomas Haverty Company to be, superior to that of Richards.

III.

226 That the evidence fails to show the agency of Armstrong and Lewis or either of them to enter into an agreement to purchase the Haverty claims, as there is no competent evidence thereof.

IV.

That the evidence was not sufficient to prove that the alleged agreement had been entered into because some of the terms had not been assented to; that is an item of about $100.00 for certain freight charges had not been agreed upon and was left for further determination.

V.

Because in the trial court counsel for the defendant in error the said Thomas Haverty Company in addressing the jury at the trial among other things, said:

"The fact that Armstrong and Lewis, Attorneys for the defendant, had authority to enter into this agreement (meaning the agreement set up in the complaint) from their client (meaning the defendant herein) might perhaps be proved by letters that may have passed between them. We (meaning the plaintiff) tried to get these letters, but they (meaning counsel for defendant) refused to produce them upon the ground that they were privileged because they were communications between attorney and client, and the Court so ruled. We therefore have to resort to other evidence as to the conduct of the parties, etc., etc."

VI.

The trial court denied the motion of the plaintiff in error (The Bank of Arizona) at the conclusion of the evidence of the plaintiff there (The Thomas Haverty Company) that the court direct the jury to return a verdict for the defendant there (The Bank
227 of Arizona) because the only evidence of said alleged contract sued on was parol, and that such contracts are not enforceable under the provisions of the statute requiring such contracts to be in writing, and known as the Sales Act. (Chap. 99 Session Laws Arizona, 1907); and because there was no competent evidence of the agency of either Armstrong or Lewis, to make the alleged contract.

VII.

Because the trial court denied the motion of the defendant there (The Bank of Arizona) at the conclusion of the introduction of all the evidence in the case to return a verdict for the defendant there (The Bank of Arizona) for the reason: That the only evidence of said alleged contract sued on was parol, and that such contracts are not enforceable under the provisions of the statute requiring such contracts to be in writing, and known as the Sales Act (Chap. 99, Session Laws Arizona, 1907); and because there was no competent evidence of the agency of either Armstrong or Lewis, to make the alleged contract.

VIII.

Because the trial court admitted in evidence the declaration of Thomas Armstrong and E. W. Lewis to prove the fact of their agency to make the alleged agreement sued on, for and on
228 behalf of the defendant there the said The Bank of Arizona.

IX.

Because the trial court required and permitted Thomas Armstrong a witness to testify as to communications, and the fact of communications between himself (the witness) and his client (The Bank of Arizona) the plaintiff in error.

Wherefore your petitioner prays that a transcript of such judgment, the record and the papers in said cause may be transmitted to the Supreme Court of the United States to be there reviewed by said court.

WALTER BENNETT,
Att'y for Petitioners.

And on to-wit: the eighth day of July, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Supersedeas Bond, in words and figures following to-wit:

UNITED STATES OF AMERICA,
Territory of Arizona:

In the Supreme Court of the Territory of Arizona.

229 THE BANK OF ARIZONA (Appellant), HUGO RICHARDS and MOSES B. HAZELTINE, Plaintiffs in Error,
vs.
THE THOMAS HAVERTY COMPANY (Appellee), Defendant in Error.

Supersedeas Bond.

Know all men by these presents: That we, The Bank of Arizona, a Corporation, organized under the laws of the Territory of Arizona, Hugo Richards and Moses B. Hazeltine, (plaintiffs in error) and Ed. W. Wells and H. W. Heap of the City of Prescott, in the County of Yavapai, in the Territory of Arizona, are held and firmly bound unto the above named The Thomas Haverty Company in the sum of Twenty Thousand ($20,000.00) Dollars to be paid to the said The Thomas Haverty Company, for the payment of which well and truly to be made, we bind ourselves and each of us, the said The Bank of Arizona, its assigns and successors, and the said Hugo Richards and Moses B. Hazeltine and the said Ed. W. Wells and H. W. Heap our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 30th day of June, 1911.

Whereas the above named The Bank of Arizona, Hugo Richards and Moses B. Hazeltine have sued out a writ of error from
230 the Supreme Court of the United States to said Supreme Court of the Territory of Arizona to reverse the judgment of the said Supreme Court of the Territory rendered on the 27th day of March, 1911, affirming a judgment of the District Court of the Third Judicial District of the Territory of Arizona, rendered therein on the 25th day of May, 1910, in a cause then pending wherein the said above named The Thomas Haverty Company was plaintiff and the said above named The Bank of Arizona was defendant, in favor of the said The Thomas Haverty Company and against the said The Bank of Arizona, for $9,313.90, and costs of suit, from which said judgment of said District Court an appeal has been prosecuted by the said The Bank of Arizona to said Supreme Court of the Territory of Arizona, and rendering judgment against said Bank of Arizona and said Hugo Richards and Moses Hazeltine (as M. B. Hazeltine) surties upon the appeal bond for the sum of $9,313.90 with interest at six per cent from the 18th day of March, 1910, and the order and judgment of said Supreme Court of the Territory of Arizona, made on the 6th day of May, 1911, reaffirming said judgment of said District Court and denying the motion of the said The Bank of Arizona, appellant, for a rehearing of said cause in said Supreme Court of the Territory of Arizona.

Now, therefore, the condition of this obligation is such
231 that if the above named The Bank of Arizona shall prosecute said writ of error to effect and answer all damages, if they fail to make their said appeal and writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE BANK OF ARIZONA,
M. B. HAZELTINE, *Cashier.*
HUGO RICHARDS. [SEAL.]
M. B. HAZELTINE, [SEAL.]
ED. W. WELLS, [SEAL.]
H. W. HEAP. [SEAL.]

Approved by—
JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Ariz.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

Ed. W. Wells and H. W. Heap being first duly sworn each for himself and not one for the other says: That he is a free holder within said County and that he is worth the sum of Twenty Thousand ($20,000.00) Dollars, the penalty in the within bond upon which he has become surety, in unencumbered property within the Territory of Arizona, over and above all his just debts and liabilities and exclusive of property exempt from execution.
232

ED. W. WELLS.
H. W. HEAP.

Subscribed and sworn to before me this 30" day of June, 1911.
[SEAL.] P. G. BROWN,
Notary Public.

My Commission Expires Dec. 23, 1913.

233 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record in a certain cause lately pending in said court, No. 1176, wherein The Bank of Arizona, a corporation, was Appellant, and The Thomas Haverty Company, a corporation, was Appellee, including the Judgment Roll, Plaintiff's Exhibits, Appeal Bond, Motion for New Trial, Amended Motion for New Trial, 1st and 2nd Bill- of Exceptions, Opinion, Judgment, Motion for Re-hearing, Notice of Appeal, Petition for Writ of Error, Order granting Writ of Error, Assignment of Errors, Supersedeas Bond, and all minute entries had and entered of record, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Writ of Error and Citation are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said court, this 1st day of August, A. D. 1911, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

234 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the Territory of Arizona:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Arizona, before you or some of you, between the Bank of Arizona, appellant, and Hugo Richards and Moses B. Hazeltine, sureties upon the appeal bond, and The Thomas Haverty Company, appellee, upon an appeal to your said court by the said The Bank of Arizona from a judgment of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa in favor of the said The Thomas Haverty Company manifest errors have happened, to the great damage of the said appellant The Bank of Arizona and to said Hugo Richards and

Moses B. Haseltine as by their complaint and petition for writ of error appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment herein be given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there heard, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct these errors what of right, and according to the laws and customs of the United States should be done.

235 Witness The Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States the 30th day of June, 1911.

F. A. TRITLE, Jr.,
Clerk Supreme Court Arizona.

Attest by—

[Seal Supreme Court of Arizona.]

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

236 [Endorsed:] No. —. In the Supreme Court of the United States. The Bank of Arizona, a Corporation, Plaintiff in Error, vs. The Haverty Company, a Corporation, Defendant in Error. Writ of Error. No. 1176. Filed July 1, 1911. F. A. Tritle, Jr., Clerk.

237 *Citation.*

UNITED STATES OF AMERICA,
Arizona Territory:

To the Thomas Haverty Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1911, pursuant to an appeal and writ of error filed in the office of the Clerk of the Supreme Court of the Territory of Arizona, wherein The Bank of Arizona, Hugo Richards and Moses B. Haseltine are plaintiffs in error and you The Thomas Haverty Company is the defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of

the Supreme Court of the United States, this 30th day of June, 1911.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

Attest:

[Seal Supreme Court of Arizona.]

F. A. TRITLE, Jr.,
Clerk of the Supreme Court of the Territory of Arizona.

Service of the foregoing citation is hereby accepted this 8th day of July, 1911.

ALEXANDER & CHRISTY,
ALFRED FRANKLIN,
Attorneys for Defendant in Error.

238 [Endorsed:] No. 1176. In the Supreme Court of the Territory of Arizona. The Bank of Arizona, a Corporation, vs. The Thomas Haverty Company, a Corporation. Citation. Filed July 1, 1911. F. A. Tritle, Jr., Clerk. In the Supreme Court of the United States. The Bank of Arizona, a Corporation, Plaintiff in Error, vs. The Thomas Haverty Company, a Corporation, Defendant in Error. Citation.

Endorsed on cover: File No. 22,845. Arizona Territory Supreme Court. Term No. 87. The Bank of Arizona, Hugo Richards, and Moses B. Hazeltine, plaintiffs in error, vs. The Thomas Haverty Company. Filed August 21, 1911. File No. 22,845.

Supreme Court U. S.
FILED
OCT 29 1913
Clerk.

No. 87.

Supreme Court of the United States

THE BANK OF ARIZONA,
Plaintiff in Error,
vs.
THE THOMAS HAVERTY CO.,
Defendant in Error.

Writ of Error to the Supreme Court of the Territory of Arizona.

ERROR TO SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF OF PLAINTIFF IN ERROR.

WALTER BENNETT,
Counsel for Plaintiff in Error.

Supreme Court of the United States

THE BANK OF ARIZONA,
Plaintiff in Error,
vs.
THE THOMAS HAVERTY CO.,
Defendant in Error.

Writ of Error to the Supreme Court of the Territory of Arizona.

NOTE—References are to marginal page of the printed transcript.

STATEMENT.

This was a suit at law in the District Court of the Territory of Arizona in and for Maricopa County by the defendant in error (The Thomas Haverty Company) against the plaintiff in error (The Bank of Arizona) to recover $9313.90.

The Complaint is in two counts.

The first count alleges that on the 28th day of February, 1908, the Haverty Company had a claim against John Noble in the sum of Fourteen Thousand, Three Hundred Six ($14,306) Dollars for materials furnished, and work done, in the erection of the Noble Building in Phoenix. That the Haverty Company had taken the necessary steps to fix a lien on the building and the lots on which it stood under the provisions of our statutes providing for the fixing of mechanics' liens.

That on the 9th day of March, 1908, the Haverty Company instituted a suit in the District Court of Maricopa County to enforce the lien and the payment of its said claim. That the Foulks-Gaylord Company, another claimant and leinor, had

joined in that suit. That John Noble, Hugo Richards and others were made defendants to that action. That Hugo Richards at the time held a mortgage upon the premises. That Hugo Richards had taken the mortgage, and the note for the security of which it was given, for the use and benefit of The Bank of Arizona (the appellant) and that the Bank was the real party in interest in the Richards' note and mortgage.

That while the action was pending and on or about the 20th day of November, 1910, the Bank (the Appellant) promised and agreed with the Haverty Company that if the Haverty Company would agree with the Bank to sell to the Bank its (the Haverty Company's) claim for, and would promise and agree to prosecute its (the Haverty Company's) suit thereon to judgment, and would promise and agree to thereafter assign the same to the Bank (Appellant) that it (the Bank) would buy the Haverty Company's said demand and claim of lien of the Haverty Company, and would pay therefor the sum of $9313.90, the said sum of $9313.90 being the amount then claimed by the Haverty Company as a lien on the said Noble Building less the sum of $4992.10, the latter sum being the value of two certain boilers and a heating apparatus and certain tools alleged to have been furnished and delivered by the Haverty Company and used in the erection of the Noble Building, which boilers, heating apparatus and tools the Haverty Company were at liberty to remove from the premises if that could be done without injury to them. That thereupon the Haverty Company (the Appellee agreed to the proposal, and agreed to prosecute its claim to judgment and to assign the judgment to the Bank (the Appellant).

That the Haverty Company did prosecute its claim to judgment for $12,429.22 with a foreclosure of the lien—that the judgment was rendered January 2nd, 1909. That the Haverty Company then offered to assign its judgment to the Bank, but the Bank refused to accept the assignment or pay the

INDEX

	Page
Statement	1- 7
Specification of Error	8-10

POINTS.

First. Demurrer to Complaint should have been sustained	10
Second. Agency of Attorneys at Law to bargain to buy claim not proved	14
Third. Terms of Transfer not agreed upon	20
Fourth. Misconduct of Counsel in argument to jury	23
Fifth and Sixth. Alleged agreement violates Statute of Frauds	26
Seventh. Admitting declaration of alleged agents to establish agency	27
Eighth. Improper questions to and answers by Attorney at Law in violation of rule of privilege	27

CASES CITED.

Boyle vs. Smithman, (Pa.) 23 Atl., 398	25
Chicago, etc. vs. Judge, 135 Ill. App., 377	25
Dow vs. Town, etc. (N. H.) 44 Atl. 489	33
Foss vs. Smith (Vt.) 65 Atl., 553	25
McKenna vs. McKenna, 118 Ill. App. 240	25
Parlin vs. Orendorff Co., 137 Ill. App. 454	25
Phillips vs. U. S. Ben Soc (Mich.) N. W. 1	34
Wicks vs. Wheeler, 139 Ill. App. 412	25

agreed sum of $9313.90 therefor. Hence their demand for judgment for $9313.90.

The second count of the Complaint is in form a common count to recover the price alleged to have been agreed to be paid for the sale and assignment of the judgment.

Transcript of Record, page 7.

The answer of the defendant (plaintiff in error) was a general demurrer to the Complaint.

Transcript of Record, page 10.

and a plea in bar admitting status of the parties, both plaintiff and defendant, as corporations; that the plaintiff (defendant in error) was the holder of a claim against Noble for material and labor furnished in the building mentioned in the Complaint and had filed a claim for lien therefor, as alleged in the Complaint, and had instituted a suit to foreclose its alleged mechanics and material mans lien, but denies knowledge of the amount of such claims.

Alleged that one, Hugo Richards, had held a mortgage on the Noble Building and the lots on which it stood; that deed had been foreclosed and the premises had been sold under the decree and Richards had a Sheriff's Certificate of sale therefor.

The defendant (the plaintiff in error) admitted that plaintiff (defendant in error) had prosecuted its alleged claim to judgment and had offered to assign the same to the defendant (the plaintiff in error) and that it (the plaintiff in error) had refused to accept the same and to pay therefor.

Every other allegation in the Complaint was denied.

Transcript of Record, pp 10.

There was an amended answer filed and appears in the record beginning at

Transcript page 14,

In the amended answer demurred generally, that it does not state facts sufficient to constitute a cause of action.

Transcript page 14,

and demurred specially to the first count,

Transcript page 14,

and specially to the second count,

Transcript page 14,

and denies each and every allegation, matter and thing alleged in the Complaint.

Transcript page 15,

and pleads further, beginning on page 15 of the transcript as follows:

Further answering, the defendant denies each and every other allegation, matter and thing in the plaintiff's complaint contained.

For its further answer this defendant shows that said plaintiff failed to do or perform any of the promises, conditions and things to be by it performed in or by the alleged agreement set up in the plaintiff's complaint and specificially denies that said plaintiff prosecuted to judgment its demand and claim for lien described in the complaint; but, on the contrary, shows that the only judgment to which the same was prosecuted was one for $12,429.22 and no more, and that, although the claim for lien set up by the plaintiff in his said action was one alleged to be prior and superior to that of this defendant upon the property described in the complaint, that said claim was not prosecuted to judgment, but, on the

contrary, was by the judgment rendered in said cause No. 5484, expressly determined and adjudged, by the court in which the same was tried, to be inferior and subordinate to the liens of this defendant.

Further answering this defendant shows that no good or, valuable thing whatsoever was ever offered, paid, or promised to be paid, given, or transferred by the plaintiff to this defendant for the alleged making of the alleged promise or agreement set up in the plaintiff's complaint herein and that any lien or claim which the plaintiff may at any time have had or claimed to have had was claimed and represented by the plaintiff to this defendant to be superior at all times to the liens of this defendant upon the real estate described in the plaintiff's complaint; but said lien was in fact subordinate in time and right to that of this defendant upon the said property and never was of any value whatsoever as against the prior and superior liens and interests of this defendant in and to said property: And at the time the plaintiff alleges it offered to transfer its lien and claim upon said property to this defendant the same had been expressly adjudged by this court to be subordinate and subject to this defendant's liens upon said property: and said judgment still stands unreversed and unmodified and no appeal has ever been taken therefrom and this defendant shows that the plaintiff's alleged lien and claim is not now and never has been of any value whatsoever.

There was a trial by jury,

Transcript page 33.

And a verdict for plaintiff (defendant in error) for $9313.90.

Transcript page 37.

A motion for a new trial was made and denied.

Transcript page 38.

Notice of appeal was given and appeal perfected to the Supreme Court of the Territory.

Transcript 40.

The motion for a new trial appears in

Transcript of Record, page 47.

The grounds alleged for a new trial are:

I.

That the verdict is not sustained by the evidence.

II.

That the verdict is contrary to the evidence.

III.

That the verdict is contrary to the law.

IV.

Because the Court erred in charging the jury, and in refusing instructions asked by the defendant.

V.

That the Court erred in denying defendant's motion made at the conclusion of the evidence of the plaintiff to instruct the jury to find for the defendant.

VI.

That the Court erred in denying defendant's motion made at the conclusion of all its evidence in the case, to instruct the jury to find a verdict for the defendant.

VII.

Because the Court erred in admitting incompetent evidence offered by the plaintiff over the objection of the defendant.

There are two bills of exceptions. The first begins

Transcript of Record, page 49,

and the other embodying the proceedings at the trial beginning

Transcript of Record, page 51.

The case was appealed to the Supreme Court of the Territory where the judgment of the trial Court was affirmed.

The opinion of the Supreme Court of the Territory appears in the record, beginning

Transcript of Record, page 204.

A Motion for a rehearing was filed in the Supreme Court of the Territory,

Transcript of Record, page 216,

and was subsequently denied,

Transcript of Record, page 217.

A supersedeas bond was allowed,

Transcript, page 218.

A petition for a Writ of Error was filed,

Transcript, page 219.

The writ was allowed.

Transcript, page 222.

And an assignment of errors filed,

Transcript, page 224.

Supersedeas bond was filed,

Transcript, page 229.

Specification of Errors.

That the Supreme Court of the Territory of Arizona, erred in its judgment affirming said judgment of said District Court, and in rendering judgment against the said The Bank of Arizona and Hugo Richards and Moses B. Hazeltine and in denying the motion of said Bank of Arizona for a rehearing of said cause, because:

I.

The said District Court overruled the demurrer of the said Bank of Arizona to the complaint, because the agreement alleged therein appeared by the said complaint to be without consideration, that the consideration therefor had failed and that the defendant in error, the said Thomas Haverty Company had not performed its part of the alleged agreement.

II.

The evidence shows that the defendant in error had not performed its part of said alleged agreement in that it obtained a judgment for $12,429.22 instead of $9,313.90, as alleged agreement provides, and that the judgment recovered by the suit the Thomas Haverty Company established the lien thereof as inferior and subordinate to that of Hugo Richards the representative of the said The Bank of Arizona (plaintiff in error here) instead as it was claimed by the said Thomas Haverty Company to be, superior to that of Richards.

III.

That the evidence fails to show the agency of Armstrong and Lewis or either of them to enter into an agreement to purchase the Haverty claims, as there is no competent evidence thereof.

IV.

That the evidence was not sufficient to prove that the

alleged agreement had been entered into because some of the terms had not been assented to; that is an item of about $100.00 for certain freight charges had not been agreed upon and was left for further determination.

V.

Because in the trial court counsel for the defendant in error the said Thomas Haverty Company in addressing the jury at the trial among other things, said:

> "The fact that Armstrong and Lewis, Attorneys for the defendant, had authority to enter into this agreement (meaning the agreement set up in the complaint) from their client (meaning the defendant herein) might perhaps be proved by letters that may have passed between them. We (meaning the plaintiff) tried to get these letters, but they (meaning counsel for defendant) refused to produce them upon the ground that they were privileged because they were communications between attorney and client, and the Court so ruled. We therefore have to resort to other evidence as to the conduct of the parties, etc., etc."

VI.

The trial court denied the motion of the plaintiff in error (The Bank of Arizona) at the conclusion of the evidence of the plaintiff there (The Thomas Haverty Company) that the court direct the jury to return a verdict for the defendant there (The Bank of Arizona) because the only evidence of said alleged contract sued on was parol, and that such contracts are not enforceable under the provisions of the statute, requiring such contracts to be in writing, and known as the Sales Act. (Chap. 99, Session Laws Arizona, 1907); and be-

cause there was no competent evidence of the agency of either Armstrong or Lewis, to make the alleged contract.

VII.

Because the trial court denied the motion of the defendant there (The Bank of Arizona) at the conclusion of the introduction of all the evidence in the case to return a verdict for the defendant there (The Bank of Arizona) for the reason: That the only evidence of said alleged contract sued on was parol, and that such contracts are not enforceable under the provisions of the statute requiring such contracts to be in writing, and known as the Sales Act (Chap. 99, Session Laws Arizona, 1907); and because there was no competent evidence of the agency of either Armstrong or Lewis, to make the alleged contract.

VIII.

Because the trial court admitted in evidence the declaration of Thomas Armstrong and E. W. Lewis to prove the fact of their agency to make the alleged agreement sued on, for and on behalf of the defendant there the said The Bank of Arizona.

IX.

Because the trial court required and permitted Thomas Armstrong a witness to testify as to communications; and the fact of communications between himself (the witness) and his client (The Bank of Arizona) the plaintiff in error.

POINTS.

First.

The demurrer to the first count of the Complaint ought to have been sustained and the trial court erred in overruling it, and the Supreme Court of the Territory erred in affirming the decision of the trial court.

The contract set up in the first court of the complaint is a simple one.

The Haverty Company had a liquidated claim for $14,306.00, which it asserted was a lien on a building and lots upon which the Bank had also a lien.

The Haverty Company had filed a suit to enforce its claim and establish its lien, and had made Richards (the representative of the Bank) a party defendant.

It is alleged that the parties agreed:

1st. That the Haverty Company should reduce its claim by about $4,992.10, being the value of certain boilers, heating apparatus and certain tools; PROVIDED that the boilers might be removed without injury to the premises, leaving the amount of the claim $9,313.90, and prosecute it to judgment.

2nd. That it would, having obtained the judgment, assign it to the Bank for $9,313.90.

That the Bank agreed, so it is alleged:

To pay $9,313.90 for the assignment to it of the judgment.

Not conceding, however, that the contract was a valid one, as we hereafter show it was not, because it was not in writing. But before the promise of the Bank became obligatory there must have been complete performance by the Haverty Company of its part of the agreement. Of course it is obvious that until the Haverty Company had done what it agreed to do there could be no obligation upon the part of the Bank.

The Haverty Company alleges that it did prosecute its claim to judgment; a judgment for $12,429.22 and the estab-

fishment of the lien of that judgment on the building and lots.

This was not in accordance with the agreement set out in the complaint. The alleged agreement was that if the boilers could be removed from the building without injury to it, the claim was to be reduced to $9,313.90. Nothing is said in the complaint as to whether the boilers could in fact be removed without injury to the building, or as to whether they were in fact removed.

The judgment that was to be obtained was the subject matter of the alleged agreement. The Court below seems to have proceeded on the theory that the agreement to prosecute the claim to judgment was complied with by the recovery of any judgment, and so ruled. The claim was for $14,306.00 and that that was a lien on the building and lots. It is alleged that it was agreed that if certain boilers could be removed from the building without injury to it, that the claim was to be reduced in amount to $9,313.90, and that when that claim was reduced to judgment it should be assigned for that sum to the Bank.

The view taken by the trial Court was that it was a matter of indifference what the amount of the judgment was—that the agreement was complied with by the prosecution of the suit to any kind of a judgment. We insist that the agreement, if there were any, implied a judgment for the amount claimed. If the suit of the Haverty Company had been "prosecuted to judgment" but for only $4,000.00, for example, it would be manifestly unfair and unjust to hold that the agreement to "prosecute to judgment" had been complied with. The simple fact is that neither the claim for $14,306.00 nor the reduced claim of $9,313.90 were reduced to judgment, but a judgment for $12,429.22 was rendered.

The suit of the Haverty Company against Richards (the representative of the Bank) to establish a lien on the build-

ing and lots upon which Richards (for the Bank) had a mortgage lien was not for unliquidated damages. The claim was definitely stated to be for $14,306.00, the value of the materials furnished in and labor done on the building. It was agreed, it is alleged, that this amount, definite and determined, should be reduced by the deduction therefrom of the sum of $4,992.10, the value of certain boilers, heating apparatus and tools, provided that the boilers could be removed without injury to the building, leaving the sum of $9,313.90. Nothing was left for determination or even computation by which to fix the amount of the claim. The exact amounts were agreed upon. If the boilers could be removed without injury to the building the claim was to be $9,313.90. While it is not so expressed in the agreement alleged in the complaint, we must assume that if the boilers could not be so moved there was to be no abatement from the original claim of $14,306.00. The complaint does not advise us whether the boilers could be so removed or not. If not, the judgment should have been for $14,306.00 without any abatement. If the boilers could be removed without injury, then the judgment should have been for $9,313.90.

It might be suggested that we were not injured by the recovery of a judgment for $12,429.22 instead of one for $9,313.90 when a tender of an assignment of the judgment for the larger sum was made to us and a demand made for only $9,313.90 as the consideration for the assignment. We cannot go outside of the allegations of the complaint. The agreement as alleged was that the claim of $14,306.00 was to be reduced by the deduction of the specific sum of $4,992.10 to the specific sum of $9,313.90. The only inference to be drawn is that the Bank wanted the claim reduced to $9,313.90 —not to $12,429.22 or any other sum. If we were to indulge in surmise we might readily see why the Bank wanted the claim reduced to the lowest figure. There can be no inference from the allegations of the complaint that the Haverty Company were to recover a larger judgment and sell it for a sum

less than its amount—to discount it in other words.

The amount of the reduction of the claim from $14,306.00 to $9,313.90 was not by way of discount, but the difference of $4,992.10 was the value of material that the Haverty Company was to retain or have liberty to take.

The necessary inference from the allegation of the complaint is that the Bank wanted the Haverty claim reduced—and it was, as alleged, reduced by agreement to $9,313.90.

The Bank never agreed, and it is not so alleged, to buy a judgment for either more or less than $9,313.90 at any price. The agreement to prosecute a claim of $9,313.90 to judgment, we insist, is not complied with by taking a judgment for $12,429.22—and if it is not, the matter is not mended, nor the Bank's liability therefor fixed by a tender of an assignment of the judgment for the greater sum at the price of $9,313.90.

We therefore think the demurrer to the first count of the complaint ought to have been sustained and that the Court below erred in overruling it.

Second.

That the evidence fails to show that Armstrong and Lewis, or either of them, were the agents of the Bank to enter into the alleged agreement to purchase the Haverty claims.

Counsel for the Haverty Company announced at the trial when objection was made by Appellant to the introduction of certain evidence stated:

> "Of course the order of proof as we realize is largely in the discretion of the Court, but we think under these circumstances, and will avow now that we will connect this matter with the principal. But we wish to show

this agreement and I think that is sometimes the only proper way to get it—by implied agency, or agency by estoppel—to proceed in this way: We show the agreement was made—the conduct of the situation and surrounding circumstances and these connect that with the principal to assume authority."

Transcript, page 86.

We might accept Mr. Franklin's proposition as being fairly within the law, but it requires us to advert to the evidence in the case bearing upon the establishment, expressly impliedly, by conduct or by estoppel, of the agency of Messrs. Armstrong & Lewis, or either of them, to make the alleged contract.

The Court held at the trial that the creation or existence of the relation of attorney and client did not in itself confer any authority upon the attorneys Armstrong & Lewis to make the alleged agreement on behalf of their client, the Bank. All lawyers know that this is so, and while it happens often in the practice of every lawyer that he makes or entertains propositions to settle lawsuits, to make compromises, or even to buy outstanding and adverse claims on behalf of his client, yet it is always understood that these are subject to ratification or rejection by the client—that these propositions are understood to be purely tentative and for the mere purpose of negotiation. It is not usual, nor is it necessary for a lawyer to say that he has not authority to bind his client by these propositions—it is tacitly understood that he has not.

In this case, however, the authority to bind their respective clients was expressly disclaimed by the attorneys on both sides.

Captain Christy testifies that after the proposition was made to him he said that it seemed fair, but that he had no authority to make a final settlement.

Christy's testimony,

Transcript, page 95.

Judge Lewis in his testimony says in detailing this conversation:

> "The Captain (Christy) said that he had no authority to conclude anything, and that he would have to submit the proposition to his clients. I said of course the situation is the same with us."

Transcript, page 152.

So it must be conclusive that at the time any tentative or other propositions were made or discussed that neither Armstrong or Lewis for the Bank nor Alexander or Christy for the Haverty Company had any authority to bind their clients, and not only that, but that each had expressed notice that the other had not such authority.

If any authority were conferred on either to conclude any arrangement, whether express, implied, by estoppel or by conduct, it must have been conferred after this conversation.

Afterwards Alexander & Christy did receive express authority to conclude arrangement for their client, the Haverty Company. The next reference to the authority of either was in the testimony of Captain Christy relating a conversation in the course of which it is claimed by Appellee that the agreement was made. In that conversation Captain Christy testified that Armstrong said: "I have just received a letter from Mr. Hazeltine: The letter I wrote"—either to Hazeltine or Wells—"of Haverty's acceptance must have crossed in the mail with this letter from him to us. He had some letter in his hand, and he said I must have exceeded my authority in making that statement."

Christy's testimony, Transcript 99.

Here, it seems to us, is a distinct disclaimer by Armstrong of authority to make that settlement—the only settlement under consideration—the one which is the subject of this lawsuit. If Armstrong had exceeded his authority, then it must be true that he had not authority to make that settlement.

Continuing, Captain Christy testifies that Armstrong said: "This letter says that Mr. Alexander has been up in Prescott going over this matter with the Bank, and he seems afraid of his case, and they instruct me that if I have not heard from Mr. Haverty on the settlement to withdraw the offer."

It is, it seems to us, rather a far fetch to infer authority which has just been disclaimed by the agent, as Armstrong had disclaimed it, from a statement by the client that the proposition should be withdrawn. Even if Armstrong & Lewis had not had authority to make the proposition yet, if they had reported to their client that they had made one, the direction of the client to withdraw the unauthorized offer is not a ratification of the offer.

But this evidence of the statement by the alleged agent (Armstrong) even if it could be deemed to imply that Armstrong & Lewis had had authority to make the proposed settlement as an inference from the direction to withdraw, the offer is not legally competent for that purpose. While it may have been admissible because it was a part of a conversation and so related to other parts of the conversation as not be disassociated from it, still it is not legal evidence to prove agency. It was the declaration of the alleged agent of the fact of his agency, or rather a declaration of the alleged agent from which the fact of agency is to be inferred.

It is well settled that the declaration of an alleged agent is not admissible to prove, or as evidence of, the fact of agency.

So any inference from the declaration of the alleged agent that the principal had made any statement, either to establish the fact of agency or any fact from which agency might be inferred, must be excluded from our consideration of the evidence—because the declaration itself must be left out of consideration, which of course, excludes with it any inferences that might be drawn from it.

Again Captain Christy testifies that after having obtained the judgment he talked to Armstrong & Lewis and told them that he was ready to assign the judgment, and continuing said: "But they said they had no authority to accept it."

Christy's testimony, Transcript 100.

So that it appears that Armstrong & Lewis, whenever the question of authority was alluded to, expressly disclaimed it.

Appellee offered evidence that Armstrong & Lewis, however, prepared an assignment of the Foulkes-Gaylord judgment and that it was purchased by the Bank. We have before discussed this incident. We cannot see how the purchase of the Foulkes-Gaylord claim, after judgment rendered establishing it to be a lien superior to the Bank's mortgage lien, warrants any inference that Armstrong & Lewis had any authority whatever to purchase the Haverty claim. The Haverty claim and the Foulkes-Gaylord claim bore different relation to the Bank claim, and the purchase of one cannot be deemed authority to purchase the other.

Again Captain Christy testified to a conversation between himself and Armstrong at Armstrong & Lewis' office, that Hazeltine (Cashier of the Bank) and Haverty, and he thinks Judge Lewis, were present, and he details the conversation. That during that conversation Christy said: "We have made

what we consider a binding contract and we expect you to live up to it."

Christy's testimony, Transcript page 102.

Captain Christy was asked: "Did Mr. Hazeltine say anything?" To which Captain Christy answered: "Nothing was said."

The only conceivable purpose of this evidence was to show that the agreement was called to Hazeltine's attention, and that as he did not repudiate it, it must be inferred that authority had been given to make it.

But Captain Christy's memory failed him in this instance. Hazeltine testifies that he was not in Armstrong & Lewis' office on any such occasion.

Hazeltine's testimony, Transcript 183.

Captain Christy was simply confused in his recollection for it was Judge Wells—an officer of the Bank—and not Mr. Hazeltine who was in Armstrong & Lewis' office upon that occasion.

Wells' testimony, Transcript 187.

But the whole effect of Captain Christy's testimony is destroyed by the testimony of Judge Wells. He says: "I don't remember of hearing the conversation at all."

Wells' testimony, Transcript 187.

And the situation of the parties at the time were such that it is clear that Judge Wells did not hear it and could not have heard it.

Lewis' testimony, Transcript 158, 159.

In any event Judge Wells was not called upon to disclaim the agreement—and, of course, as he did not hear it he could not disclaim it.

Again Captain Alexander testifies that at Prescott at the Bank office he had a conversation with Judge Wells and Mr. Hazeltine. He testifies that in response to his statement that Armstrong & Lewis had made an offer to settle the Haverty claim; that Hazeltine said: "You had better take it if he offered you that."

Alexander's testimony, Transcript 119.

It will be noted also that just Alexander testified that Wells said in that conversation concerning priorities that they "had counsel Armstrong & Lewis and he guessed they were able to attend to the matter. He (Wells) was not attending to the law portion of it."

Alexander's testimony, Transcript 121.

This statement excludes the idea that Armstrong & Lewis had other authority than that incidental to their employment as legal counsel.

We think we have given a resume of all the evidence that aspires to prove the agency of Armstrong & Lewis to make the alleged agreement, and we submit that it completely fails to establish, or even warrant the slightest inference of, the authority of the Attorneys Armstrong & Lewis to make it.

The flimsiness of this evidence—its complete lack of warrant for such an inference of authority as to justify the verdict of the jury, well illustrates the harm of the error of the Court in admitting certain evidence, which we will next consider.

Third.

The evidence was not sufficient to prove that the alleged agreement had been entered into because some of its terms

had not been assented to; that is, that an item of about One Hundred ($100.00) Dollars for certain freight charges had not been agreed upon and was left for further consideration.

At the interview testified to by Captain Christy, at which it is claimed the agreement was arrived at, it was said by Captain Christy that Mr. Armstrong said, after Captain Christy had said to Mr. Armstrong, that he then had a letter from his client agreeing to the terms of the proposed settlement.

> "We made a little mistake in figuring the other day * * * I see we omitted to check off one item * * * of $111.00 freight. To which I (Christy representing Haverty) replied: 'Mr. Haverty will be over in a few days and I shall recommend to him that he cut that item out of the settlement, though I can't say whether he will until I hear from him or see him.'"

And this was the last word said in perfecting the alleged agreement.

Transcript, page 98.

As was well said by the Court in his charge to the jury, there could be no contract or agreement between these attorneys until there was a positive, clear, and distinct declaration without reservations.

If Christy had insisted upon the agreement standing as it had been stated between him and Lewis there might have been a meeting of the minds, but when he voluntarily stated that Armstrong's position was correct but that he had no authority to change the amount named then he withdrew from his position and the whole question was left open and undetermined to be settled only upon consultation with Haverty, the president of his company, and until he had received au-

thority from Haverty he had no right as declared by himself to agree to any change.

The evidence fails to disclose that Mr. Christy or the plaintiff through anyone else thereafter agreed to the striking out of the $110 item.

The Supreme Court of the Territory dismisses this contention with the simple statement:

> "Here again the jury have differed with the appellant as to the sufficiency of the evidence."
>
> Transcript 210.

It was not a question of dispute of fact. As a matter of law upon the admitted fact related by the witness was the contract entered into. There was an item—small relatively it is true—upon which there was not an agreement. If there was an agreement it must have been as to all its terms. Here is one expressly held in abeyance to await the authority to the agent of the defendant in error to assent to the omission. There is no evidence that its omission was ever assented to. There had yet been no definite meeting of the minds of the parties to the alleged agreement.

It illustrates the suggestion we have before made of the practice of attorneys in their negotiations looking to a settlement of the matters of dispute between their clients.

At an earlier stage of the negotiation Captain Christy as attorney for the defendant in error had said that he had not yet had authority from his principal to accept the proposed settlement—Judge Lewis for the plaintiff in error at the same time stated that they (his firm, Armstrong & Lewis) were in the same situation.

When it came to the discussion of the item in question Captain Christy again disclaims authority to settle unless it

should be specifically obtained from his client. And it is never suggested by Judge Lewis or Mr. Armstrong that they had obtained specific authority to settle on any terms.

This evidence, we contend discloses that the parties had not yet come to a final determination of the provisions of the proposed settlement—and it is a matter of law and not one of fact we submit, upon which the verdict of a jury cannot be decisive.

Fourth.

Our fifth specification of error is based upon the address of one of counsel (Captain Alexander) to the jury.

It will be observed that there was a persistent effort of the defendant in error at the trial of the cause to procure the production, and the introduction in evidence at the trial, of certain correspondence between Armstrong & Lewis, and their client the plaintiff in error. Much of this effort was in the presence of the jury. The trial court ruled this evidence out, properly enough.

In his argument of the case to the jury, however, counsel for defendant in error, used this among other language:

> "The fact that Armstrong and Lewis, Attorneys for the defendant, had authority to enter into this agreement (meaning the agreement set up in the Complaint) from their client (meaning the defendant herein) might perhaps be proved by letters that may have passed between them. We (meaning the plaintiff) tried to get these letters, but they (meaning counsel for the defendant) refused to produce them upon the ground that they were privileged because they were communications between attorney and client, and the Court so ruled. We therefore have to resort to other evidence, as to the conduct of the parties, etc."
>
> Transcript 49.

Apparently defendant's case had not been damaged enough by allowing the questions and answers on the examination of Armstrong which related to privileged communications. Captain Alexander in his opening argument, desiring to get these letters before the jury in some way, violated the rule which prohibits counsel from referring in any way to evidence not allowed in the case, and this rule is more stringent, we are satisfied, in privileged communications than in any other classes of privileges upon which clients have a right to rely. We believe the violation of the rule in the case of arguing privileged communications, or even referring to them as Captain Alexander did, should meet with just as severe a rebuke as would be given to a prosecuting attorney who would refer to the fact in any way that the defendant in a criminal case had failed to take the witness stand in his own defense. What is the use of the Court ruling that privileged communications shall not be allowed in evidence in the case, if counsel in his argument to the jury disregards the ruling, and tells the jury "that the authority of Armstrong & Lewis might perhaps have been proved by letters that may have passed between them," and that he and Christy had tried to get the letters but that the Bank refused to produce them upon the ground that they are privileged, and that the Court had so ruled, and that he therefore had to resort to other evidence as to the conduct of the parties, etc." So far as its effect upon the minds of the jurors was concerned the privileged communications might just as well have been a part of the record.

The mere suggestion of Captain Alexander that they might have been able to prove the knowledge and authority of the Bank with relation to the proposed purchase of the Haverty lien, had it not been for the objection of the Bank and the sustaining of the objection by the Court to the introduction of the letters which Armstrong had been compelled to admit were in existence, was sufficient to impress the jury with the idea that these letters contained statements which were dam-

aging to defendant's case, or would aid in making out plaintiff's case.

The authorities on this subject are very plain and distinct.

Wigmore on Evidence, Vol. IV., Secs. 2272 and 2322.

Boyle vs. Smithman, (Pa.) 23 Atl. 398.

"It is improper for an attorney to comment upon evidence which has been excluded by the court."

Wicks vs. Wheeler, 139 Ill. App. 412.

"In civil cases considerable latitude is allowed counsel in commenting on the parties, BASED ON THE TESTIMONY, but they cannot go outside thereof."

Foss vs. Smith, (Vt.) 65 At. 553.

"It is improper and pernicious practice for counsel to argue and draw deductions from evidence which has been excluded by the court."

Chicago & M. Elec. R. Co. vs. Judge, 135 Ill. App. 377.

"Conduct of counsel consisting of an effort to place before the jury matter which has been ruled incompetent by the court is improper, and GROUND FOR REVERSAL."

Parlin vs. Orendorff Co., 137 Ill. App. 454.

"Notwithstanding improper remarks have been objected and the objections thereto sustained, A REVERSAL MAY BE ORDERED on account thereof if the remarks are of such a prejudicial character as not to have been effaced in effect by the sustaining of the objections thereto."

McKenna vs. McKenna, 118 Ill. App. 240.

Fifth and Sixth.

The trial court denied the motions of the plaintiff in error, for a direction to the jury to return a verdict for the plaintiff in error (defendant below). The plaintiff moved the Court for such direction at the close of the plaintiff's evidence, and again at the close of all the evidence in the case.

Transcript, page 145.

Transcript, page 188.

The statutes of Arizona provide:

> "A contract to sell or a sale of any goods or CHOSES IN ACTION of the value of Five Hundred Dollars or upwards shall not be enforceable by action unless the buyer shall accept a part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."
>
> Sec. 4, Chap. 99, page 230, Session Laws, 1907, of Arizona.

The judgment obtained by the defendant in error against Noble which is the subject matter of the alleged agreement to purchase, and the purchase price for which is sued for in a "chose in action," within the purview of this statute.

There is not a suggestion in the record of the existence of any note or memorandum of the alleged agreement of the plaintiff in error to purchase the judgment, nor is there any evidence whatever of the acceptance of an assignment of it, nor of the payment of any consideration.

Therefore, the motion of the plaintiff in error for a direction to the jury to find for it should have been granted. The alleged agreement was not established by any competent evidence.

Therefore, the judgment of the trial Court was not sustained by the evidence.

Seventh.

We submit that the Court erred in permitting evidence of the declarations of Armstrong and of Lewis as to their agency. This we have heretofore discussed to some degree.

The declaration of an alleged agent, until at least his agency has been established by competent proof, are but hearsay, and not competent to prove the very fact of agency.

As Professor Wigmore says it is merely begging the very question.

Wigmore Evidence Sec. 1078 (top of page 1280).

Eighth.

The trial court required and permitted Thomas Armstrong an attorney at law engaged professionally by the plaintiff in error, to testify as to the fact of communications between himself and his client.

The attorney was asked:

> "Do you recollect, Mr. Armstrong, of having some correspondence with Mr. Hazeltine, as cashier of the Bank, between the 3rd day of December and the 6th day of December, 1908?"

The witness over the objection of plaintiff in error was required to answer and he said that he did.

Transcript 126.

He was then asked if he recollected to have written a letter (to the Bank) about Dec. 5th or 6th.

Transcript 127.

Objection was made on the ground that it was a privileged correspondence conducted between attorney and client.

The Court overruled the objection and the witness answered that he did.

Transcript 127.

Counsel also asked Mr. Armstrong if the letter was in reference to this litigation, or this matter of the Haverty lien.

Transcript 128.

Over the objection of plaintiff in error the witness was required to answer, and he answered in the affirmative.

Transcript 128.

He was asked if he had received a letter from Hazeltine after he (Armstrong) had written him.

The witness was required to answer over the objection of the plaintiff in error.

Transcript 128.

Over the objection of the Appellant the witness Armstrong was required to disclose that the letter was in the possession of Mr. Morrison (one of counsel for plaintiff in error.)

Transcript 129,

and that it was then in Court.

Transcript 129.

And finally Mr. Morrison refused to produce the letter upon the demand of Mr. Alexander.

Transcript 129,

and stated the ground of his refusal to be that that letter and all others were privileged communications between attorney and client.

Transcript 130.

And all this, let it be remembered, was in the presence and hearing of the jury.

Presumptively every communication between attorney and client while that relation exists is privileged. Therefore it was improper to have asked, at any rate in the presence of the jury, if there were correspondence between them. But counsel were permitted to go beyond the mere fact of correspondence, and the questions were so framed as to draw out that the letter referred to the Haverty matter of litigation and was written at the very time which Captain Christy testified that Armstrong stated to him the contents of a letter he had just received from Hazeltine.

We need not, we think, discuss the question of the admissibility of this letter itself for the Court excluded it later because it was a privileged communication between attorney and client.

If the fact that the letter was written by Hazeltine to Armstrong & Lewis at a time when it would in due course of mail have reached them at the time Christy testified that Armstrong said he had a letter from Hazeltine relating to the Haverty matter, would warrant a jury in the inference that the letter was as Christy testified that Armstrong said it was then in effect the privileged communication, was in fact disclosed.

In other words the Court permitted the witness to testify to the fact that Hazeltine had written and Armstrong had received a letter fitting the description of a letter given by Christy in his testimony.

It is no answer to say that we might have denied that the letter was of the description Captain Christy gave it—to do that we must have produced the letter—reducing us to the unfortunate situation of preserving the inviolability of the communication by disclosing it ourselves.

It is quite possible that it would have been wiser for us to have produced the letter—but what becomes of the rule, when to have its benefit we are compelled to waive it. And of what use is the rule when it can be indirectly evaded as it was unquestionably evaded in this case.

We have no doubt that the jury were led to believe that the letter would have disclosed the fact of complete authority to make this settlement—and that fact was not legally inferable from the facts proved—yet as a matter of inference of fact by the jury it was completely justified.

By the admission of the testimony of Armstrong the rule that communications between attorney and client are privileged was rendered nugatory.

We had the absolute right to rely upon the rule that these communication are privileged and inviolable—and we were deprived of it.

We have not cited any authorities to the point that this communication itself was a privileged one for the Trial Court decided that it was.

We wish here to call to the attention of this Court to the letter which was excluded by the trial Court as above

stated and which was filed and marked for the purpose of identification "Exhibit D" was inadvertently omitted from the Abstract of Record. To supply that omission we now give it here as follows:

"December 3, 1908.

"Messrs. Armstrong & Lewis,
"Phoenix, Arizona.

"Gentlemen: I thought perhaps you should be advised of a little chat we had with Captain J. L. B. Alexander, President Judge Wells, Mr. Alexander and myself.

"The object seemed to be the effecting of a compromise in the Haverty case, he offering to waive all interest, approximately $800.00 he said, take back the tools some $1200, and if insisted upon, take out the heater and deduct some $650.00. Was willing to consider the removing of the boilers if they would be taken out without injury to the building, but of course did not want to take back boilers as the freight to Los Angeles would be such an item.

"From the above and from the further fact that he said the Richards judgment was irregular in that it included a $6,000.00 note which was not covered by the mortgage—of which fact he said you were aware—and would be attacked and upset if we did not agree to the compromise suggested. We inferred that he did not feel very secure in his lien or rather the security afforded thereby.

"He also stated that inasmuch as Haverty was not made a party in the suit of foreclosure (Richards' mortgage) they would have a right of redemption dating from time of the securing of their judgment or something like that.

"In the matter of the $6,000.00 note being secured by the mortgage. Judge Wells declined to discuss the matter simply referring him to you.

"We made no proposition whatever, nor did we in any way accede to any he made. Suggested that he work up a deal whereby we should have our money and expense back and settle claim that way.

"Very truly yours,

"M. V. Hazeltine, Cashier."

And add this comment that this letter, which we say cannot be used as evidence for any purpose, does emphasize the fact that the priority of the Haverty lien over the Bank's lien was the essential condition of any tentative agreements that may have been entered into between the attorneys; and that it does not afford the least warrant for an inference that Armstrong & Lewis had authority to make the agreement alleged in the complaint. That the letter was inadmissible was decided by the Court—that the evidence concerning it in the presence of the jury was prejudicial there can be no doubt.

> "While the learned trial judge made a proper disposition of the matter, nevertheless the PROPOUNDING OF THE QUESTION was calculated to convey an IMPROPER IMPRESSION TO THE JURY. * * * the practice of allowing a question that counsel must be assumed to know can not be answered is highly reprehensible, and where the trial court or appellate division is satisfied that the verdict of the jury has been influenced thereby, it should, for that reason, set aside the verdict."
>
> Cosselmon vs. Duffee et al., 65 N. E. 494, (N. Y.)

> "Where the mere putting of the question conveys to the jury information which cannot be properly laid before them, and which tends to render the trial unfair, and consequently illegal, a verdict so obtained stands

exactly as if the illegal evidence were introduced by error in a ruling of the court."

Dow vs. Town of Weare, 44 At. 489, (N. H.)

"If a client-party claims the privilege, no inference should be drawn against him as to the unfavorable nature of the information sought. Whatever the reasoning may be for other privileges it is plain that here the drawing of such an inference would virtually disclose the communication, and it is this very disclosure against which the privilege protects.

Wigmore on Evidence, Vol. IV., Sec. 2322.

"If there is such a policy involved in the privilege it applies equally to the prohibition of inferences, differing only in the degree of danger involved."

"The rule equally forbids inferences from the non-production of privileged coduments."

Wigmore on Evidence, VI., IV., Sec. 2272.

We have the right to conclude that the jurors did draw improper inferences damaging to defendant's rights upon the question and answer being allowed by the Court showing that letters had been written between the client and attorney on the subject of the Haverty lien and its proposed purchase:

"Upon the trial his (plaintiff's) counsel stated to the court, in the presence of the jury: 'Something has been said about getting Dr. LeSeure here. I have his diagnosis, which I will offer in evidence, if my brothers don't object to it.' Of course the presumption is that this diagnosis was favorable to plaintiff's claim; else it would not have been offered. It was clearly incompetent, and his counsel so admitted. The offer should not have been made in the presence of the jury.

The jury might readily draw an inference of its contents. Counsel should not offer testimony in the presence of the jury which they know is incompetent. The purpose of such offers is apparent."

Phillips vs. U. S. Ben Soc of Saginaw, 79 N. W. 1 (Mich.)

We respectfully insist, therefore, that the judgment of the Supreme Court of the Territory and of the District Court should be reversed.

Respectfully submitted,

WALTER BENNETT.

SUBJECT INDEX.

	Page
Statement	1
Argument	2–34
I. The bank's demurrer was properly overruled	2–5
II. The Haverty Company performed its part of the contract to assign	5–8
III. The evidence shows that Armstrong and Lewis were properly authorized by the bank to purchase the Haverty Company's claim	8–13
IV. The contract for the assignment of the Haverty Company's claim was a complete legal act	13–15
V. The remarks of counsel for the Haverty Company to the jury were not improper	15–19
VI. The denial of the bank's motion for a directed verdict at the conclusion of the Haverty Company's evidence was proper	20–21
VII. The denial of the bank's motion for a directed verdict at the conclusion of all the evidence in the case was proper	21–27
VIII. The admission of the declarations of Armstrong & Lewis as to their agency in the purchase of the Haverty Company's claim for the bank was not erroneous	28–34

Cases and Authorities Cited.

Am. & Eng. Encyc. of Law (2d ed.), V. 29, p. 811	23
p. 812	22
p. 832	26
Bergtholdt vs. Porter Bros. Co., 114 Cal., 681; 46 Pac., 728	28
Brennen vs. City of Seattle, 46 Wash., 427; 90 Pac., 434	18
Bruce vs. Osgood, 113 Ind., 360; 14 N. E., 563	31
Cary vs. Switchmen's Union of North America, 98 Minn., 28; 107 N. W., 129	18
Columbia and Puget Sound R. R. Co. vs. Hawthorne, 144 U. S., 202	21
Crane vs. Powell, 139 N. Y., 389	24, 24–25
Cyc., V. 20, p. 311	22
V. 31, pp. 1652–1655	28
Diamond vs. Jaekquith, 125 Pac., 712	26

	Page
Dunlap vs. United States, 165 U. S., 486	13
Easterly vs. Gatter, 17 Okla., 99; 87 Pac., 853	16
Encyc. of Evid., V. 10, p. 23	20
p. 26	21
Encyc. Pl. & Pr., V. 1, pp. 715–717	22–24
First Nat. Bank of Wilber vs. Redpath, 47 Neb., 96; 65 N. W., 37	13
Glass vs. Hulbert, 102 Mass., 24	27
Gulf, C. & S. F. Railway vs. Curb et al., 66 Fed., 519	17
Hager vs. Shindler, 29 Cal., 65	30
McGahan vs. Bank of Bondurt, 156 U. S., 218	22
Makin & B. Ry. Co. vs. Parker, 127 Ga., 471; 56 S. E. 618	19
Marks vs. Davis, 72 Mo. App., 557	26
Miller vs. Harper, 63 Mo. App., 293	24
Mo. Pac. Ry. Co. vs. Simmons et al., 6 Tex. Civ. App., 631; 25 S. W., 926	19
Murphy vs. De Haan, 116 Iowa, 61	26
People vs. Wilson, 55 Mich., 506	16–17
Rev. Stat., Ariz. 1901, paragraph 1283	3
paragraph 2535, subdivision 4	30
Richards vs. United States, 175 Fed. 911	17
Richardson vs. Nelson, 221 Ill., 154; 77 N. E., 533	18
San Antonio Traction Company vs. Parks (Tex.), 97 S. W., 510	18
Sawyer vs. United States, 202 U. S., 150	18
Scharff vs. Klein, 29 Mo. App., 551	24
Sherman & S. Ry. Co. vs. Bell (Tex.), 58 S. W., 147	15
Smith vs. Pullman Co., 138 Mo. App., 226; 119 S. W., 1072	29
Tays vs. Carr, 37 Kans., 141; 14 Pac., 456	31
Topliff vs. Topliff et al., 145 U. S., 156	22
United States vs. Bell Tel. Co., 167 U. S., 224	22
United States vs. Buchman, 11 Ariz., 178; 89 Pac., 413	17
White vs. Elgin Creamery Co., 109 Iowa, 533; 79 N. W., 284	28
Williams vs. Blumenthal, 27 Wash., 84; 67 Pac., 399	30

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 87.

THE BANK OF ARIZONA, PLAINTIFF IN ERROR,

vs.

THE THOMAS HAVERTY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This case was commenced and tried to a jury in the District Court of the Third Judicial District of the Territory of Arizona and judgment was rendered therein upon the verdict returned in favor of the defendant in error (plaintiff in the trial court), and upon appeal by the plaintiff in error (defendant in the trial court) to the Supreme Court of the Territory of Arizona said judgment was affirmed, and from said judgment of affirmance the writ of error herein was sued out.

For the sake of brevity we shall hereinafter refer to the plaintiff in error as the "bank" and to the defendant in error as the "company."

ARGUMENT.

Nine specifications of error are assigned by the bank, upon which a reversal of the case is sought.

I. The bank's demurrer was properly overruled.

The first specification assigned as error is the overruling of the bank's demurrer to the company's complaint by the trial court, because of want of consideration for the agreement alleged in the complaint, because the consideration therefor had failed, and because the company had not performed its part of the agreement.

It will be noted that this specification assigns three separate errors by the trial court in overruling the demurrer, viz: (*a*) Because the agreement alleged in the complaint appeared by the said complaint to be without consideration; (*b*) because it appeared on the face of plaintiff's complaint that the consideration for the said agreement had failed; (*c*) because it appeared from the complaint that the company had not performed its part of the alleged agreement.

The contract sued on in the case was a simple agreement on the part of the bank to buy, and on the part of the company to sell, the company's claim and demand against John Noble and its claim of lien upon the Noble Building, amounting to $14,306.00 for the sum of $9,313.90. It required the company to prosecute to conclusion a suit then pending to fix and determine the amount of its lien upon said building, and to assign such judgment as might be recovered therein to the bank, for which the bank was to pay the company the sum of $9,313.90. The complaint alleges the making of the agreement, its performance by the company, and its breach by the bank in the bank's refusal and failure to pay the company the $9,313.90, or any part thereof (R., 1-5).

(*a*) An inspection of the complaint will show that the consideration for the promise of the bank to buy was the promise of the company to sell and assign. It is too well settled to require citation of authority that a promise is sufficient consideration to support a promise.

(*b*) The contention of the bank that the complaint on its face shows that the consideration for the alleged agreement had failed is not borne out by any of its allegations. The complaint alleges a promise on the part of the bank to buy a demand and claim against John Noble and a claim for lien against the Noble Building for a specific price, and an agreement on the part of the company to sell the same to the bank for that price—namely, $9,313.90—with a further agreement on the part of the company to prosecute its demand and claim for lien to judgment and assign the judgment therein recovered to the bank. The complaint also shows that the privilege was given to the company to remove certain boilers from the Noble Building, provided the same could be done without injury to the building, and this plain language of the complaint cannot be twisted to change a mere privilege granted into a condition precedent to the enforcement of the contract.

(*c*) That the complaint on its face shows that the company had not performed its part of the contract is equally untenable, as a mere inspection of the complaint will disclose. The complaint alleges in both general and specific terms that the company has fulfilled and performed its promise and agreement with the bank in every particular. The mere general allegation of performance is sufficient, under paragraph 1283 (section 74) of the Revised Statutes of Arizona of 1901, which reads:

> "In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part. * * *"

Moreover, the assignments of error incorporated in specification one were urged in substantially the same language by the bank in the Supreme Court of Arizona, and that court in its decision disposed of the same adversely to the bank in the following language (R., 99-100):

> "It is assigned as error, —
>
> "First. 'That the court overruled the appellant's demurrer to the complaint because upon the facts stated in the complaint the alleged contract by which it was claimed the appellant agreed to purchase the judgment thereafter to be obtained by the appellee (the Haverty Company) was wholly without consideration; that the consideration therefor had wholly failed, and that appellee had not performed its part of the alleged agreement.'
>
> "The argument in support of this assignment is made entirely upon the ground of failure of consideration. It is conceded that the mutual promises were each the consideration for the other, but it is claimed that there was a failure of consideration by reason of the judgment recovered in the case being $12,429.22. Appellant urges in support of this assignment the argument that the contract alleged in the complaint was a conditional one, that if certain boilers could be removed from the building the claim was to be reduced to $9,313.90, and if so reduced the judgment secured on said claim should be assigned to the bank.
>
> "The extract from the complaint (*supra*) alleges that the offer on the part of the defendant was to pay $9,313.90 for the $14,306.00 'demand and claim of lien therefor,' and that if the boilers, heating apparatus and tools which represented the other $4,992.10 could be removed from the building without injury thereto, the plaintiff was at liberty to remove them. The inference being that unless such removal could be made without injury to the building, they would remain therein. The argument in support of the failure of consideration is refuted by the language of the allegation in the complaint, that if the plaintiff should ' rosecute its said suit thereon to judgment and would promise and agree there-

after to assign the same to the said defendant,' there being no agreement or guarantee as to the exact amount of the judgment, other than that it should be the judgment recovered in that case."

II. The Haverty Company performed its part of the contract to assign.

The second specification of error herein of the bank is that the evidence shows that the defendant in error had not performed its part of the said alleged agreement, in that it obtained a judgment for $12,429.22, instead of $9,313.90, as the alleged agreement provides, and that the judgment recovered by the Thomas Haverty Company established the lien thereof as inferior and subordinate to that of Hugo Richards, the representative of the Bank of Arizona, plaintiff in error here, instead of superior to that of Richards, as it was claimed by the Thomas Haverty Company to be.

The answer to this specification is that there is no allegation in the complaint from which it may be inferred that the agreement alleged therein provides for the recovery by the company of a judgment for any specific sum upon its suit for lien, or that the judgment that might be recovered should be for a lien superior to the mortgage of the bank, nor is there any evidence in the record proving, or tending to prove, any such fanciful agreement. The evidence introduced by the company in that respect by the witness Christy was as follows (R., 45, 47):

"Mr. Lewis of the firm of Armstrong & Lewis, came over to my office in the Fleming Building and said that his people—I think he used the word 'we'—we wish to close up these liens, and I said what are you going to do about mine? Well, he said, we will have to concede that the Foulkes-Gaylord lien is prior to our mortgage. We are going to take up all the liens, but we consider that the Thomas

Haverty lien is subordinate to our mortgage. I told him that I thought there was a chance for a difference of opinion.

* * * * * * *

"He said, we are willing to pay for just the materials and labor you have put in the building which we can use. He said you have a claim for lien there which comprises many items of tools; as to those you are not entitled to a lien; to which I agreed."

And, testifying to a conversation that happened a few days later, Mr. Christy again said (R., 49, 49-50):

"Which we then deducted from the total amount of the lien claimed by the Thomas Haverty people, which was $14,360.00, leaving a balance on deducting $4,992.10—it left a balance of $9,313.90. Then I said, now, your proposition is that you will pay us $9,313.90, and they said yes. Well, I said, how about those tools, have we the right to remove them, and Mr. Armstrong said yes, if they were there, there are a good many tools there that have been boxed, if they haven't been removed you can take all the tools you can find. Then I said how about the boiler and the heater, if you won't pay for them, how about them? He said, well, if they can be removed by Mr. Haverty without injuring the building, you can take them, but if taking them out—in taking them out—they would have to take out part of the side of the building or injure the building or the walls in any way, you can't have them. I said all right. Now, about the assignment of the lien——"

* * * * * * *

"This conversation in Mr. Armstrong's office happened on the 30th day of November, 1908. Now, I said, how about this assignment of this claim, and Mr. Armstrong said we don't want an assignment of the claim, we want you to carry this suit of yours through to judgment and assign us the judgment. Well, I said, how about these various items, and he said prove all you can prove, anyhow, and assign us the judgment for all you can get, and stated the reason for it was because there were certain lease-

holds on the building and other claims for lien which, even though the Thomas Haverty lien might not be prior to the mortgage, it was prior to those later leaseholds or later claims, and they wanted to cut them out."

Concerning this specification, which was urged by the bank in the court below in substantially the same language as it is urged here, that court said (R., 100):

"Second. (a) That the evidence showed that the appellee had not performed its part of the alleged agreement, in that it obtained a judgment for $12,429.22, instead of $9,313.90, as the alleged agreement provides, and that the judgment recovered by the Haverty Company (appellee) established the lien thereof as inferior and subordinate to that of Hugo Richards, the representative of the bank (appellant), instead of, as it was claimed by appellant to be, superior to that of Richards (the bank).

"Again, the appellant ignores the plain language of the alleged agreement and bases its assignment upon a provision that is not included in its terms and cannot be inferred therefrom. The alleged agreement (above cited) does not provide for a judgment for $9,313.90, or any other definite sum, neither does it provide that the lien thereof should be decreed to be superior to that of Richards. The deal seems to have been made because of the uncertainty as to the priority of the lien. It was contended by counsel for the bank that the lien was inferior to that of Richards, and by counsel for the Haverty Company that it was superior thereto; neither party appeared to be confident of the correctness of his position. This uncertainty resulted in the compromise by which the Haverty Company would receive a sum less than its full claim, and the chance of being able to remove and retain the material representing part of the balance, and the bank would avoid the danger of having to pay more than the cost of that part of the materials furnished than it could use to advantage under the modified plans for completion of the building they were then acquiring

> under foreclosure proceedings. If the counsel for the bank had felt certain that the lien of the claim was superior to the mortgage lien, they would probably have been willing to pay the face value of the claim. If counsel for the Haverty Company had felt certain of the priority of the lien over that of the mortgage, they would not have sold it nor agreed to sell it for less than the full face thereof, $14,306.00."

It would seem that the opinion of the Supreme Court of Arizona, just quoted, is a complete answer to this specification of error.

III. The evidence shows that Armstrong and Lewis were properly authorized by the bank to purchase the Haverty Company's claim.

Specification number three of the bank is "that the evidence fails to show the agency of Armstrong and Lewis, or either of them, to enter into an agreement to purchase the Haverty claim, as there is no competent evidence thereof."

The testimony of Mr. Christy, above quoted, and also his further testimony in the case, together with the testimony of Mr. Alexander, sufficiently established the agency of Armstrong and Lewis to enter into the agreement to purchase the Haverty claim for the bank. The same was submitted to the jury, the jury found it true, and returned a verdict for the company.

Mr. Christy, continuing his testimony, said:

> "I submitted the proposition to Mr. Haverty on the night of November 30th, and on December 3rd, 1908, I received in return authorization from Mr. Haverty to close.
>
> "By Mr. FRANKLIN:
>
> "Q. Through what source?
>
> "A. Through the United States mail—he simply saying we accept the proposition. Thereupon—

whether it was—I won't say that it was on the third, though I think it was—either the third or fourth—either Friday or Saturday—in answer to a phone from Mr. Armstrong's office, Mr. Lewis talking, asking if I had yet heard from Mr. Haverty, I replied that I had and that I would come over with his answer. I went over to the office. I think both Mr. Armstrong — Mr. Lewis were present. I told them that I had a letter from Mr. Haverty agreeing to their terms, and that we would close on that basis—that we would carry our lien to judgment and assign the same to them, they to prepare the form of assignment they desired and submit it to us, and we would have it properly executed. * * * (R., 50-51.)

* * * * * * *

"He said, all right, you carry it on to judgment and prove all that you can, and I said you are to prepare a form of assignment and submit it to us and we will execute it. * * *

"It was either one or two days after that I received a phone from Mr. Armstrong, and I went over to Messrs. Armstrong & Lewis' office in the Cotten Building. Mr. Armstrong said, I have received a letter from Mr. Hazeltine * * *; the letter which I wrote informing—I don't know whether he said the bank or Mr. Hazeltine or Mr. Wells—of Haverty's acceptance must have crossed in the mail with this letter from him to us. He had some letter in his hand, and he said, I fear I *must have exceeded my authority* in making that settlement—this letter says that Mr. Alexander has been up in Prescott going over this matter with the bank and he seems afraid of his case, and *they instruct me that if I have not heard from Mr. Haverty on the settlement to withdraw the offer*. Now, that is as near—I think that is the substance of his words, and pretty nearly his exact words. He didn't read the letter to me, simply stated the contents to me, he having it in his hand. At that time I stated that I considered it a final settlement and expect you to live up to it." (R., 51, 51-52.)

"* * * the Thomas Haverty Company and

the Foulkes-Gaylord Company were joint plaintiffs in foreclosing liens upon the Noble building—both plaintiffs in the same action—and I represented them both in that action with Mr. Alexander.

* * * * * * *

"Q. Did you have any agreement, contract or arrangement with Messrs. Armstrong & Lewis, or either one of them, with reference to that?

"A. We had a great deal of discussion on it. They said, we are going to take up your lien; we consider that we can't get away from the Foulkes-Gaylord lien, and that will be paid in full. I asked him at this meeting with Mr. Lewis whether they would take an assignment then, and he said, no, you must go ahead and carry it to judgment, because there were certain leases on that building which they wished to cut out.

* * * * * * *

"Q. Did you carry that Gaylord lien to judgment?

"A. I carried that to judgment. I didn't issue execution upon it; I told them that if they would prepare an assignment of the judgment we would execute it. They did prepare an assignment of the judgment, together with a draft for the amount—I think the draft was signed by Armstrong & Lewis, but I don't remember, and it was drawn upon Harry Heep of Prescott. The letter from them said they are enclosing the draft and assignment of the judgment, and to forward the same to the Foulkes-Gaylord Company to be executed, and then have them send the executed——" (R., 53-54.) (The letter was introduced, marked "Exhibit B;" see page 13 of the record.)

* * * * * * *

"Upon receipt of that letter I forwarded the assignment, which was enclosed therein, and the draft, to the Foulkes-Gaylord people at Los Angeles, where it was executed and forwarded to Prescott, and the draft paid." (R., 54.)

Mr. Alexander testified as follows:

"I had a conversation with Mr. Hazeltine, cashier of the bank, and also with E. W. Wells, vice-presi-

dent of that bank, on the third day of December, 1908." (R., 58.)

* * * * * * *

"I called on Hugo Richards for this reason: Prior to leaving here for Prescott, on the 30th of November, a proposition had been made by Messrs. Armstrong & Lewis, attorneys for Hugo Richards, in this city, in this foreclosure of mechanics' lien by Haverty Company, in which Christy and myself were attorneys for Haverty—a proposition to compromise and pay a certain amount of money for the claim." (R., 59.)

* * * * * * *

"When I went in there Hugo Richards was in the office, and I went over to him and I said to him that we have had a talk with Mr. Armstrong and Lewis, and they had made an offer to compromise the Haverty claim, but that he had excluded certain material, boilers and heating apparatus, and I wanted to see if he wouldn't take them as well. Richards said this is a bank matter, I have nothing to do with it, see Hazeltine, he has it in charge.

* * * * * * *

"I went from the east end of the bank to the west end of the bank to Hazeltine's stall in the bank. I met Mr. Hazeltine, and I said I just came to see Mr. Richards here in reference to the Haverty claim, and he tells me to come to see you, that you are in charge of it, that it is a bank matter. He said all right, come in. Judge Wells was standing at a little desk on the west side of the bank writing something, and Hazeltine said there is Judge Wells, let him come in, too. I said yes, and he opened the door going into the extreme west little room of the bank, and Judge Wells and Hazeltine went in there, and I said to Hazeltine and Judge Wells that Armstrong & Lewis had made an offer to settle the Haverty claim and had offered $9,313.00. I had a sheet of paper which showed the exact amount offered and what had been deducted—I showed him that. He said, well, if he has offered you that you had better take it. I said, I know that; we have submitted that to Mr. Haverty for acceptance, but that isn't it; what I want to see

> you about is whether you will not take in addition the boilers and heating apparatus. They are in the building; you certainly will need them. They are in the building and hard to get out. You have to have a heating plant to heat the building and you will need them. Judge Wells said we have modified the plans of this building and it is too expensive, and we will not need them. We have provided other methods of heating the building. * * * I went out and went to the telephone office and phoned Christy that I had seen Mr. Hazeltine. * * * I phoned the result of the conversation with Mr. Hazeltine and Judge Wells. * * *" (R., 60-61.)

The bank presented specification three in one of its assignments of error to the Supreme Court of Arizona in the same language as it is presented here, and that court considered the same as follows (R., 100):

> "(*b*) 'That the verdict of the jury is not supported by the evidence, in this, that the evidence fails to show the agency of Armstrong & Lewis, or either of them, to enter into an agreement to purchase the Haverty claim.'
>
> "This issue was presented by the court to the jury as a question of fact and they were fully instructed by the court that unless the agency of Armstrong & Lewis, or the ratification by the defendant bank of this deal by them with the Haverty Company was established to their satisfaction by the preponderance of the evidence, they should find for the defendant. The verdict of the jury on this issue, based upon the conflicting evidence in the case, will not be disturbed by this court."

With the evidence above quoted before it, the Supreme Court of Arizona was clearly justified in dismissing this specification of error as it did, for that evidence clearly disclosed that on the 30th of November, 1908, Armstrong and Lewis assumed to act as agents for the bank in making an offer to purchase the demand and claim of lien of the company, and also of the Foulkes-Gaylord Company, at a given

price; that on the following day the attention of the bank was called to the offer and its terms, and instead of repudiating the offer or denying the authority of Armstrong and Lewis to make such an offer, they said to Mr. Alexander, "If he has offered you that you had better take it," thus affirming and confirming the authority of Armstrong and Lewis to make such an offer of settlement when their attention was called thereto, and ratifying the offer made. Furthermore, the offer made by Armstrong and Lewis was accepted by the Haverty Company before the bank notified Armstrong and Lewis to withdraw their offer if it had not been accepted. And, moreover, the bank did afterwards recognize and carry out a similar contract made at the same time by Armstrong and Lewis with Christy to take over the claim of Foulkes-Gaylord Company.

Therefore, the jury was justified in inferring from the fact that a similar contract had been made by Armstrong with Christy with respect to the same subject-matter, which the bank approved and carried out, that Armstrong and Lewis had similar authority to make the contract in question.

First Nat'l Bank of Wilber vs. Ridpath, 47 Neb., 96; 66 N. W., 37.

IV. The contract for the assignment of the Haverty Company's claim was a complete legal act.

In specification number four of the bank complaint is made that the evidence was not sufficient to prove that the alleged agreement had been entered into, because some of the terms had not been assented to; that is, an item of about $100.00 for certain freight charges had not been agreed upon and was left for further determination.

The evidence of Mr. Christy upon the matter assigned in the specification is as follows:

"* * * in answer to a phone from Mr. Armstrong's office, Mr. Lewis talking, asking if I had yet heard from Mr. Haverty, I replied that I had and that I would come over with his answer. I went over to the office. I think both Mr. Armstrong — Mr. Lewis were present. I told them that I had a letter from Mr. Haverty agreeing to their terms, and that we would close on that basis—that we would carry our lien to judgment and assign the same to them, they to prepare the form of assignment they desired and submit it to us, and we would have it properly executed. At that time Mr. Armstrong said to me * * * we made a little mistake in figuring the other day, George, or Christy—I don't know which he called me—he said I see we omitted to check off one item, which was an item on page five, freight on pipe machine, $111.60. * * * He said you having no lien for tools you should not have any lien for freight upon tools. To which I replied, Mr. Haverty will be over in a few days and I shall recommend to him that he cut that item out of your *settlement*, though I can't say whether he will until I hear from him or see him. It was either one or two days after that I received a phone from Mr. Armstrong, and I went over to Messrs. Armstrong & Lewis' office in the Cotten Building. Mr. Armstrong said, I have received a letter from Mr. Hazeltine——

"Mr. MORRISON: Before that, Mr. Christy—with reference to this conversation that you had with Messrs. Armstrong & Lewis, or either one of them, after getting the authorization from Mr. Haverty, when you told him that you would accept the proposition, what did he say?

"The WITNESS: *He said, all right, you carry it on to judgment and prove all that you can*, and I said you are to prepare a form of assignment and submit it to us and we will execute it." (R., 51.)

The above testimony clearly shows that before the question of the item mentioned in said specification was spoken of by Armstrong, the witness Christy had informed him of the acceptance by Haverty of his offer to purchase their

claim, and that conclusion is strengthened by the remark of the witness Christy to Armstrong when, in speaking of this item, he said, "Mr. Haverty will be over in a few days and I shall recommend to him that he cut that item out of your *settlement*," and the witness, when asked by the bank's counsel what did Armstrong say, stated further, "He said, all right, you carry it on to judgment and prove all you can, and I said, you are to prepare a form of assignment and submit it to us and we will execute it," showing that both Christy and Armstrong then considered the offer and acceptance a completed contract and settlement made between the parties, and that the same as made could not be modified or changed so as to deduct the $100.00 item without Mr. Haverty's consent. Moreover, the question as to whether or not the contract was a completed one and certain as to terms was submitted to the jury under proper instructions of the trial court (R., 93), and the jury, by its verdict, found that it was.

In view of the testimony given with respect to the matter assigned in this specification and the instructions of the trial court thereon to the jury, this court will not disturb the finding of the jury.

V. The remarks of counsel for the Haverty Company to the jury were not improper.

The bank's fifth specification of error is predicated upon the remarks of defendant in error's counsel in addressing the jury. The remarks of Mr. Alexander to the jury, which the bank contends were prejudicial, could be in no wise harmful. In the first place, he was merely commenting upon a well-established principle of law that if the agency of Messrs. Armstrong and Lewis to make the contract was evidenced by written authority, it was the company's duty, if possible, to produce such written authority before the jury, for it was the best evidence, but if such written author-

ity could not be produced, the company had a right to rely on other and secondary evidence of such authority to prove its case. He did not comment on any matter contained in the communications from the bank to Messrs. Armstrong and Lewis, but simply said that, in the absence of written authority to make the contract, the company had to rely on other evidence of such authority.

It is the duty of counsel to produce the very best evidence the nature of the case will permit of, and an effort to produce the best evidence, if unsuccessful, cannot be predicated as error if other legal evidence is produced to prove the case. No more is the comment of counsel to this effect prejudicial, provided the comment relates only to a matter which was properly before the court—namely, the existence of letters and the refusal of defendant's counsel to produce them.

The general rule of law with reference even to improper statements in the argument to the jury is that a new trial will not be granted upon the ground of misconduct of an attorney in his argument to the jury, unless the circumstances are such as to raise a belief that such misconduct influenced the jury.

Easterly vs. Gatter, 17 Okla., 93; 87 Pac., 853.

In the case of *People vs. Wilson,* 55 Mich., 508, a murder case, where the defendant took the stand in his own behalf and on cross-examination stood on his privilege and refused to answer certain questions propounded to him by the prosecution, which refusal was commented upon afterwards by the prosecuting attorney in his argument to the jury, the court, speaking through Chief Justice Cooley, said (p. 515):

> "In his summing up the prosecuting officer alluded to the fact that the respondent, when questioned about the ownership of the gun, put himself on his privilege and declined to state. The remark was objected to and not followed up. It would have

been more proper to have abstained, but the remarks afforded no sufficient ground for disturbing the verdict."

In the case of *United States vs. Buchman*, 11 Ariz., 178; 89 Pac., 413, 414, the Supreme Court of Arizona, in passing upon a similar question, said:

> "There does not appear to be anything in this statement to constitute a reversible error or entitle it to a new trial. The statement of the counsel by way of argument as to what might have been done was entitled to go to the jury as any other argument counsel might present based upon or inferred from, the facts placed in evidence."

In the following cases the courts considered the question of what remarks of counsel to a jury constitute reversible error and declined to set aside verdicts because of such remarks:

Gulf, C. & F. S. Railway vs. Curb et al., 66 Fed., 519, 520-521.

Richards vs. United States, 175 Fed., 911, 923.

Further, if such remarks of counsel constituted error, the error was cured by the following instruction of the trial court (R., 94-95):

> "* * * there was some reference by counsel with respect to privileged communications here and letters not introduced in evidence. Now, you are not to assume that because the court has excluded any letters offered here to be put in evidence that those letters contain anything at all that would indicate there was any such authority. You are not to conclude that because they were excluded, the letters contain anything like that. They were excluded because they are in law privileged communications, being communications made from client to lawyer, and they are excluded on that ground, and the mere fact that they are excluded is no reason why you are to assume that these letters, if admitted, would contain any evidence."

In the case of *San Antonio Traction Company vs. Parks* (Texas), 97 S. W., 510, the court said:

> "The court did not err in not granting a new trial because of improper remarks of plaintiff's counsel in his closing remarks to the jury. * * * The court instructed the jury not to consider it. It must be presumed that the jury obeyed the instruction and was not influenced by such improper remark."

In the case of *Makin & B. Ry. Co. vs. Parker,* 127 Ga., 471; 56 S. E., 616, 619, the court said:

> "The harmful effect of the remark, if there was such, was obviated by the instruction of the judge, wherein he informed the jury that it had nothing to do with the case and that they must not consider it in determining the issues involved."

The same ruling was made under similar circumstances in the following cases:

Richardson vs. Nelson, 221 Ill., 154; 77 N. E., 583, 586.

Sherman S. & S. Ry. Co. vs. Bell (Texas), 58 S. W., 147, 150.

Carey vs. Switchmen's Union of North America, 98 Minn., 28; 107 N. W., 129, 130.

Brennen vs. City of Seattle, 46 Wash., 427; 90 Pac., 434, 435.

Dunlap vs. United States, 165 U. S., 486, 498-499.

Sawyer vs. United States, 202 U. S., 150, 167-168.

In regard to the particular matter under discussion, the court below said (R., 101):

> "Third. 'That the court erred in overruling appellant's motion for a new trial because of the improper comments by counsel for appellee in his argument to the jury, in the statement that "The facts that Armstrong & Lewis, attorneys for the de-

fendant, had authority to enter into this agreement (meaning the agreement set up in the complaint) from their client (meaning the defendant herein) might perhaps be proved by letters that may have passed between them. We (meaning the plaintiff) tried to get these letters, but they (meaning the counsel for defendant) refused to produce them upon the ground that they were privileged because they were communications between attorney and client, and the court so ruled. We, therefore, have to resort to other evidence as to the conduct of the parties, etc., etc.'

"The language of counsel, while the propriety of it might be questioned, does not, we think, constitute reversible error. It might be entitled to be considered as an explanation by counsel to the jury of their failure to establish agency by the best evidence. The appointment of an agent, or the direct statement of the principal authorizing the agent to act as such, constitute the best evidence, and ordinarily, if obtainable, can be introduced in evidence to show agency. In this case Armstrong & Lewis, who are claimed to have been the agents of the bank, were the attorneys of the bank in the litigation relative to the entire subject matter here in issue; the trial court had excluded certain letters which counsel for appellee contended contained authority to Armstrong & Lewis to act as the bank's agents, and counsel evidently was undertaking to explain to the jury why he had to rely upon circumstantial rather than direct evidence of agency. The instructions of the court on this subject were very clear and explicit to the effect that no inference could be drawn by the jury from the exclusion of the letters that they contained any evidence that would tend to establish agency, but that their exclusion was simply upon the theory that they contained privileged communications between client and counsel which rendered them inadmissible."

VI. The denial of the bank's motion for a directed verdict at the conclusion of the Haverty Company's evidence was proper.

The bank's sixth specification of error is based upon the ruling of the trial court denying the motion of the bank, at the conclusion of the evidence of the plaintiff there (the company), that the court direct the jury to return a verdict for the defendant: First, upon the ground that the only evidence of said alleged contract sued on was parol and that such contracts are not enforceable under the provisions of the statute requiring such contracts to be in writing and known as the "Sales Act;" and, second, because there was no competent evidence of the agency of either Armstrong or Lewis to make the alleged contract.

This specification sets up a ground for direction of verdict which was not made, or even suggested, to the trial court—namely, that the alleged contract sued on was parol and unenforceable upon that ground. The motion as actually made was as follows:

> "Mr. MORRISON: Now we move the court to direct a verdict in behalf of the defendant in this case because of the failure of proof on the part of the plaintiff to establish any contract that was completed and closed up as between the plaintiff and the defendant." (R., 72.)
>
> "The COURT: I deny the motion.
>
> "Mr. KIBBEY: We want to make a further motion. There has been no sufficient proof of authority for the attorneys to make a settlement of the claim." (R., 73.)

We submit that the first ground assigned in the sixth specification should not be considered by this court, for the reason that the motion as actually made was not made upon the ground assigned, as above shown.

As to the second ground assigned, the record discloses that at the time of making the motion the bank had not

rested its case, but that subsequent to the making of the motion introduced evidence in the case in its defense, and therefore any exception which it might have taken to the denial of its motion to direct a verdict on that ground was waived. The rule in such cases is that the refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, and when defendant has not rested his case, cannot be assigned for error.

Columbia & Puget Sd. R. R. Co. vs. Hawthorne, 144 U. S., 202, 206, and cases therein cited.

VII. The denial of the bank's motion for a directed verdict at the conclusion of all the evidence in the case was proper.

The bank's seventh specification of error that the trial court denied the motion of the defendant there (the bank), at the conclusion of the introduction of all the evidence in the case, to return a verdict for the defendant there (the bank), for the reason, first, that the only evidence of said alleged contract sued on was parol and that such contracts are not enforceable under the provisions of the statute requiring such contracts to be in writing, and, second, because there was no competent evidence of the agency of either Armstrong or Lewis to make the alleged contract, contains two separate and distinct grounds for the motion and is very different from the motion actually made at the close of the case, which was:

> "Mr. KIBBEY: We desire to make a motion that the court direct the jury to return a verdict for the defendant." (R., 91.)

And the argument upon the motion made was based entirely upon the alleged failure of the evidence to establish an agency in Messrs. Armstrong and Lewis to make the contract sued upon. (R., 91.)

The first ground for the motion set forth in the seventh specification of error was not touched upon in the trial court, either by objections to evidence introduced or in the motion and the argument of counsel thereon, nor was the question raised by the bank in its motion for a new trial (R., 22-23), nor in its amended motion for a new trial (R., 23-24), nor was the question presented to or passed upon by the Supreme Court of Arizona in its opinion in the case (R., 98-102), nor was this question raised by the bank's motion for a rehearing in the Supreme Court of Arizona. (R., 103.)

Hence, we respectfully urge that the first ground of the bank's seventh specification of error ought not to be considered by this court, for the reason that it endeavors to invoke for the first time in this court the statute of frauds in defense of the action. This court will not review any question on this writ of error which was not presented or urged in the trial or Supreme Court and was not passed upon by those courts, the rule being that objections not raised in the court below will not be considered on writ of error in this court.

Topliff vs. Topliff et al., 145 U. S., 156, 173.
McGahan vs. Bank of Rondout, 156 U. S., 218, 232.
United States vs. Bell Tel. Co., 167 U. S., 224, 263-264, and cases therein cited.

The statute of frauds, to be available as a defense, should have been pleaded and urged at the trial. The court was not bound to interpose the statute for the bank. (20 *Cyc.*, 311.)

It is elementary that the statute of frauds does not make a contract not executed in compliance therewith void. As is well said in 29 *Am. & Eng. Encyc. of Law* (2d ed.), 812, "The statute of frauds does not make oral contracts void, nor render written contracts binding." It merely confers upon the party sued on such contract a privilege or defense of which he may avail himself or not as he sees fit. If, as in

this case, a defendant fails to plead the statute in defense or to urge it as a basis for the exclusion of parol evidence to establish the contract, he waives his defense or privilege on that score and cannot thereafter take advantage of it. The applicable rule is thus stated in 29 *Am. & Eng. Encyc. of Law* (2d ed.), 811:

> "Waiver of Protection of Statute—1. In General.—*A party to a contract within the statute of frauds has the right, if he choose to exercise it, to waive the protection of the statute, and thereby make the contract binding.* He cannot be compelled to avoid his contract, and, therefore, neither the court, nor a stranger to the contract, can interpose the defense of the statute for him.
>
> "2. *Waiver by Failure to Plead.*—The better doctrine is that the failure of a party to take advantage of the statute in his pleadings will be deemed to be a waiver of the defense. And the same result will follow if he pleads the statute but fails to object upon the trial to the admission of evidence relating to the verbal contract." (Italics ours.)

The following from 9 *Encyc. Pl. & Pr.*, 715-717, is to the same effect:

> "IV. Waiver of the Defense—1. In General.—*It is quite possible to lose the protection of the statute of frauds by not insisting upon it or bringing it before the court, and after a party has waived the defense, either openly or tacitly, in the court below, he cannot set it up in the appellate court.*
>
> "2. Defense Waived Unless Pleaded.—As has been before stated, the better doctrine seems to be that the statute of frauds must always be pleaded to be available as a defense. It follows from this, as a natural consequence, that where the party fails to take advantage of the statute in his pleadings, he must be deemed to have waived it.
>
> * * * * * * *
>
> "Where the contract is denied.—Certain cases have already been mentioned which hold that, if a defend-

ant denies the alleged contract, he need not plead the statute. Of course, where this doctrine obtains, the defendant cannot be considered to have waived the defense by failure to plead it. *But even in this case the statute must be set up at the trial or it will be held to be waived.*

"3. Enforcement of the Contract.—When the statute of frauds is waived through failure to plead it, and the alleged contract is admitted or satisfactorily proved, the contract will be enforced although it may be obnoxious to the statute." (Italics ours.)

These text statements are abundantly sustained by cases cited in the notes, from which the following are taken:

Scharff vs. Klein, 29 Mo. App., 551.
Miller vs. Harper, 63 Mo. App., 293.
Crane vs. Powell, 139 N. Y., 389.

In *Scharff vs. Klein* the court said:

"No case, however, can be found which goes to the extent that the defense of the statute may not be waived, and *it is evident that in order to make the defense available, it must be asserted in some manner which calls the attention of the trial court to the fact that it is relied on as a defense.*" (Italics ours.)

In *Miller vs. Harper* it was held that, where a defendant allowed the introduction of parol evidence to prove a contract within the statute of frauds, without objecting, either while it was being introduced, or by motion to strike out, or otherwise, he was held to have waived the defense.

In *Crane vs. Powell* the court said:

"When the defect in the plaintiff's cause of action appears on the face of the complaint, the defense must be interposed by demurrer. When the complaint does not, as in this case, disclose an invalid agreement upon its face, but it is, in fact, invalid for some reason, the defendant must take the objection by answer, and if the objection is not taken in either way, the

> defendant is deemed to have waived it. The conclusion is thus reached that the defendant waived the benefit of the statute in this case by omitting to plead it."

The defense of the statute of frauds was not raised in the pleadings of the bank in the trial court, nor was objection there made by the bank to the introduction of parol proof of the contract sued upon. Under the circumstances, it is submitted, the bank must be held to have waived that defense, even if it would have been available if interposed in due time, which is by no means conceded.

Moreover, even if the bank had relied upon the statute of frauds in the trial court in defense of the action, that defense would not then have been available, because the evidence shows beyond contradiction that the company had completely performed its part of the contract to assign. By the terms of that contract the Haverty Company was to prosecute its mechanic's lien to judgment for all that it could get and was then to assign the judgment to the bank. The judgment was secured and a tender of an assignment thereof made to the bank. Everything that the company could do in the performance of its contract was done. Only performance by the bank in the payment of the stipulated price remained to be made. By virtue of this contract the bank had secured a substantial benefit in that it was able to foreclose its mortgage on the property against which the company had a lien without molestation by the latter on the ground that the lien was superior to the mortgage, and hence the bank saved time as well as embarrassment, and also in the fact that the bank by reason of this contract would be able to foreclose its mortgage to greater advantage because the question of priority as between the lien and mortgage would no longer affect the bidding at the foreclosure sale. With nothing remaining to be done by the company on the execution of its contract, and with substantial benefits inuring to the bank in the very fact that such a contract existed, it is submitted that the con-

tract was taken out of the operation of the statue of frauds. That full performance by one of the parties to an oral contract within the statute of frauds takes the contract out of the statute is well settled. 29 *Am. & Eng. Encyc. of Law.* (2d ed.), 832, states the rule as follows:

> "FULL PERFORMANCE ON ONE SIDE—(1) *In General.*—As already intimated, the statute of frauds has no application where there has been a full and complete performance of the contract by one of the contracting parties, and the party so performing may sue upon the contract in a court of law. He is not compelled to abandon the contract and sue in equity or upon a *quamtum meruit.*"

The Supreme Court of Arizona adopted and applied this doctrine in the case of *Diamond vs. Jacquith,* 125 Pac., 712. In its opinion in that case the court quoted with approval the following extracts from the opinions of other courts:

Murphy vs. De Haan, 116 Iowa, 61, 62; 89 N. W., 100:

> "Contracts within the statute are not void, and, if performed or partly performed, they are, to the extent of such performance, taken out of the statute. When executed, or so far as executed, such contracts are valid, and as binding as if they had been in writing. This statute was not enacted for the purpose of aiding one in the perpetration of a fraud, but to secure him from the consequences thereof. It was intended as a shield, and not as a sword."

Marks vs. Davis, 72 Mo. App., 557-563:

> "In view of this line of decisions, we think we can safely say that the rule is firmly established in this State that a full and complete performance of a contract by one of the contracting parties takes the contract out of the statute of frauds, and that the party so performing his contract may sue upon it in a court of law, and that he is not compelled to abandon the contract and sue in equity or upon a *quantum meruit,* as seems to be the law in some of the States."

Glass vs. Hulbert, 102 Mass., 24, 35; 3 Am. Rep., 418:

> "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds."

In the light of these cases and authorities it is submitted that the defense of the statute of frauds is not available at this stage of the case: (*a*) because it was not interposed in either of the courts below, and therefore, as a matter of appellate practice, is not subject to review in this court; (*b*) because it was not interposed in the trial court and must therefore be held to have been waived by the bank: (*c*) and because the complete performance of the contract by the company with a corresponding and immediate benefit conferred thereby upon the bank takes the contract out of the statute of frauds.

The second ground set forth in the seventh specification of error is but a repetition of the bank's third specification of error, which has been answered in the argument under that head.

VIII. The admission of the declarations of Armstrong and Lewis as to their agency in the purchase of the Haverty Company's claim for the bank was not erroneous.

The bank's eighth and ninth specifications of error, to-wit:

"VIII.

"Because the trial court admitted in evidence the declaration of Thomas Armstrong and E. W. Lewis to prove the fact of their agency to make the alleged agreement sued on, for and on behalf of the defendant there, the said The Bank of Arizona.

"IX.

"Because the trial court required and permitted Thomas Armstrong, a witness, to testify as to communications; and the fact of communications between himself (the witness) and his client (The Bank of Arizona), the plaintiff in error."

raise the same question, or involve phases of the same question, and we shall consider them together.

While the general rule is that the declarations of an alleged agent are not admissible against the alleged principal to prove the fact of agency nor to show the extent of the agent's authority, which facts must be proved by other evidence before the agent's acts and statements can be proved against the principal, yet the declarations of the agent are admissible to show that the agent believed himself to be the agent of the alleged principal and so held himself out, and that third persons dealt with him as such in good faith, and also to corroborate an agency *prima facie* proved.

31 *Cyc.*, 1652-1655.

Bergtholdt vs. Porter Bros. Co., 114 Cal., 681; 46 Pac., 728, 739-40.

White vs. Elgin Creamery Co., 108 Iowa, 522; 79 N. W., 284.

The rule that the agency cannot be proved by the acts and declarations of the alleged agent is modified where the alleged principal is an artificial individual, all the acts of which must be done by agents.

Mo. Pac. Ry. Co. vs. Simmons et al., 6 Tex. Civ. App., 621; 25 S. W., 996.

Smith vs. Pullman Co., 138 Mo. App., 238; 119 S. W., 1072.

Evidence that one openly acts for another under circumstances implying a knowledge on the part of the supposed principal establishes a *prima facie* agency.

10 *Encyc. of Evid.*, 23.

Even if it were error to receive the declarations of Messrs. Armstrong and Lewis, which we dispute, nevertheless, in the face of the subsequent testimony, the alleged error could not have been prejudicial to the bank. The fact of the authority of Messrs. Armstrong and Lewis to make the offer of settlement cannot well be disputed in the face of the uncontradicted testimony of Mr. Alexander: "I said to Hazeltine and Judge Wells that Armstrong and Lewis had made an offer to settle the Haverty claim and had offered $9,313.90. *I had a sheet of paper which showed the exact amount offered and what had been deducted—I showed him that. He said, well, if he has offered you that you had better take it. I said, I know that, we have submitted that to Mr. Haverty for acceptance.*" (R., 60.)

Here was not only notice to the bank that Armstrong and Lewis were assuming to act as agents for the bank, but also a recognition by the officers of the bank of the existence of original authority to so do, and in addition a complete and absolute confirmation and ratification of its consummated execution. Where the officers of a corporation which can deal only through agents have been informed that its attorneys have made an offer in its behalf, and such officers then advise the offeree to accept the offer, and the offeree

does accept the offer, the corporation may not thereafter be permitted to deny the authority of such attorneys to make such offer. This principle of law is too well recognized to need citation of authority to support it.

Neither was it error for the trial court to require or permit Thomas Armstrong, one of the attorneys for the bank, to testify as to the fact of letters passing between himself and the bank. Paragraph 2535, Revised Statutes of Arizona of 1901, subdivision 4, reads:

> "An attorney cannot, without the consent of his client, be examined as to any communication made by his client to him, or his advice given thereon, in the course of his professional employment."

This statute is a copy of section 1881 of the California Code of Civil Procedure. It is also the same as paragraph 5994, subdivision 2, of Ballinger's Annotated Codes and Statutes of the State of Washington, except that the Washington Code uses the words "shall not" for the word "cannot" in our statute. In construing the California statute the supreme court of that state, in the case of *Hagar vs. Shindler*, 29 Cal., 65, said:

> "That it is settled that if a client, pending the relation of attorney and client, communicates to the attorney a fact foreign to the object for which the attorney was retained, the communication is not to be regarded as confidential."

In the case of *Williams vs. Blumenthal*, 27 Wash., 24; 67 Pac., 393, 395, the Supreme Court of Washington, in construing its statute, said:

> "The employment of the attorney is not in itself a privileged communication, nor is the authority of an attorney to act as agent such a communication. * * * The fact that the agent was an attorney would not place him under any different rule from any other agent. There can be no element of confidence in the authorization of an agent to act as such."

Vol. 10, Encyc. of Evidence, 237, states the rule as follows:

> "Statements made by client to attorney in the course of conferring authority upon him to make a contract or other business arrangement with a third person for client are not confidential, nor are statements giving him power to authorize a third person to do a certain act, nor are statements made in conferring authority to make a compromise."

In the case of *Taye vs. Carr*, 37 Kans., 141; 14 Pac., 456, an objection was made to the introduction of a letter on the ground that it was a privileged communication between attorney and client. The letter was admitted and read over the objection. The Supreme Court of Kansas said:

> "In his deposition was a letter of defendant to J. R. Good, Esq., whom the defendant claims was his attorney at the time the letter was written. Objection was made to its introduction, and an offer to prove that the relation of attorney and client existed as claimed. The court declined to hear evidence on that point, and allowed the letter to be read. This was no error. An attorney is incompetent to testify concerning any communication made to him by his client, without the client's consent. It is not *the communication itself from attorney to client that is incompetent, but the attorney is prevented from testifying concerning it.*"

To the same effect is the case of *Bruce vs. Osgood*, 113 Ind., 360; 14 N. E., 563.

From the foregoing authorities we feel justified in asserting that any letter or communication between the bank and its attorneys, Armstrong and Lewis, authorizing the latter to contract for and settle the claim involved in the pending litigation, was not confidential, nor within teh rule as to privileged communications. Even where the matter itself is privileged, it is not the communication from the attorney to the client that is incompetent, but the attorney is incom-

petent to testify concerning the same without the consent of his client; therefore, even though the letters concerning the existence of which the witness Armstrong was examined may have been privileged, nevertheless, the fact that the letters existed could be shown, though the witness Armstrong could not testify as to their contents without the consent of the bank.

Manifestly, the company was in duty bound to establish its case by the best evidence obtainable, and if there were written authorization from the bank to its attorneys to make and enter into the contract pleaded by the company, such agency should have been established, if possible, by the production of such written authorization, or legal excuse shown why such authorization was not produced; and until the existence of a written authorization had been shown and its production demanded, the bank could not properly claim its privilege; and even when the bank claimed its privilege, the written communication must then have been submitted to the trial court for its determination whether the written communication was privileged or not. The fact that there were communications is not privileged, but at most only the contents of the communications themselves.

Anyhow, the examination of the witnesses Armstrong and Lewis with respect to whether or not letters had passed between them and the bank was but preliminary to, and to lay a foundation for, a demand for the production of whatever letters may have passed between them, so as to determine from the letters themselves, under the supervision of the court, whether or not there was any authority therein contained from the bank to Armstrong and Lewis to enter into the agreement which is alleged in the complaint to have been entered into. No attempt was made to introduce letters which treated solely of confidential relations between the bank and Armstrong and Lewis as attorneys. The witnesses Armstrong and Lewis were not asked while under examination to state the contents of any letter that passed

between them and the bank, but were merely asked if letters had passed between them and the bank between certain dates. The record discloses that the court did not require the witnesses Armstrong and Lewis to produce any letters that passed between them and the bank, nor did it permit them to testify to any matter contained in any such letter, but upon the statement of counsel for the bank that such letters as had passed between the bank and Armstrong and Lewis were privileged communications, the letters were neither inspected by the court nor by counsel for the company, nor were they produced by the bank for such inspection, except one letter which the court inspected, and, upon inspection, declared to be privileged and refused to allow it to be introduced in evidence. (R., 64-69.) And, though this letter was not introduced in evidence, counsel, who so strenuously insist that it was error to permit examination of the witnesses Armstrong and Lewis with respect to the existence of any communications between them and the bank, have, nevertheless, incorporated in the transcript (p. 15), and also in their brief filed herein (p. 31), the one letter selected by themselves from the mass of such correspondence and the one letter submitted to and inspected by the trial court, and by it declared to be privileged, and now ask this court to consider the contents of such letter as a part of the record and evidence in this cause, when, upon their own motion in the trial court, the contents thereof, as well as the contents of all other letters passing between Armstrong and Lewis and the bank, were excluded from the jury and never considered by it in arriving at its verdict.

In conclusion, we respectfully submit to the court that every question raised by the specifications of error assigned by the bank on this writ of error was presented to the Supreme Court of Arizona and by that court determined adversely to the bank, except the question of the application of the statute of frauds, incorporated in specifications six and

seven herein, which was not urged in the trial court or in the Supreme Court of Arizona, as shown by the opinion of the latter court (R., 98-102), and therefore cannot be presented for the first time in this court and reviewed by this court, under the authorities hereinbefore cited; and that as to the questions contained in the specifications of error and passed upon by the court below, the record discloses no reversible error, and the judgment of the lower court should, therefore, be affirmed.

Respectfully submitted,

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